IN THE SUPREME COURT OF MISSOURI

ST. CHARLES COUNTY, et al., Appellants,	)	
v.	)	SC 86302
CITY OF ST. PETERS, et al., Respondents.	)	

SUBSTITUTE BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

Constitutional Provisions

JURISDICTIONAL STATEMENT

This case involves claims that the City of St. Peters violated the provisions of the Tax Increment Financing Act, §§ 99.800 et seq. RSMo (1991) and that certain portions of the Tax Increment Financing Act violate the Missouri Constitution both on a facial and as applied basis. The appeal was originally filed in this Court, but transferred to the Court of Appeals, Eastern District. The Court of Appeals, Eastern District issued an opinion. Appellants sought transfer after opinion. This Court sustained the transfer application. This Court's jurisdiction is founded on Mo. Const. Art. V, § 10.

STATEMENT OF FACTS

Plaintiff St. Charles County originally filed this action on August 9, 2000. Joe Ortwerth, a taxpayer residing in the City of St. Peters, who is also the St. Charles County Executive, was added as a plaintiff. Thereafter, the Plaintiffs dismissed the action pursuant to Rule 67.02. This action was filed on October 4, 2001. (LF1)

Following discovery, the parties filed cross-motions for summary judgment. The trial court conducted a hearing and sustained the motion of the defendants, entering summary judgment in defendants' favor. This appeal followed.

The parties filed a stipulation of facts with the trial court. (LF 1234-1250). In addition, several undisputed affidavits were presented to the trial court. The stipulation is fully set out here for the Court's convenience.

A. Parties

1. St. Charles County is a First Class Charter County and political subdivision of the State of Missouri existing pursuant to the constitution and laws of the State of Missouri.

2. Plaintiff, Joe Ortwerth, the duly elected County Executive of the County of St. Charles, brings this action as the County Executive.

3. Ortwerth is a resident of St. Peters and the County.

4. St. Peters is a municipal corporation and Fourth Class City of the State of Missouri existing under the authority of the Constitution and statutes of the State of Missouri.

B. St. Peters' 1992 Redevelopment Ordinances

5. In December, 1992, St. Peters adopted Ordinance No. 1961, an Ordinance finding that a certain blighted area exists in St. Peters, setting forth the boundaries of the St. Peters Centre ("SPCC") Redevelopment Area, finding that the SPCC Redevelopment Area would not reasonably be anticipated to be developed without adoption of the SPCC Redevelopment Plan ("the Plan"), and adopting the SPCC Redevelopment Plan. A true and correct copy of Ordinance No. 1961 is attached as Exhibit 4, Plaintiffs' Motion for Partial Summary Judgment.

6. Also in December, 1992, St. Peters adopted Ordinance No. 1962, adopting tax increment financing for the SPCC Redevelopment Area, and setting forth the legal description of the Area identified as the "TIF District Description." A true and correct copy of Ordinance No. 1962 is attached as Exhibit 5, Plaintiffs' Motion for Partial Summary Judgment.

C. St. Charles County Tax Levies

7. St. Charles County imposes a ½ cent general sales tax and has imposed the tax since the adoption of the SPCC Redevelopment Plan by St. Peters.

8. St. Charles County imposes a ½ cent transportation sales tax and has imposed the tax since the adoption of the SPCC Redevelopment Plan by St. Peters.

9. St. Charles County imposes a ¼ cent capital improvements tax and has imposed the tax since the adoption of the SPCC Redevelopment Plan by St. Peters.

10. St. Charles County imposes a ¼ cent general sales tax and has imposed the tax since the adoption of the SPCC Redevelopment Plan by St. Peters.

11. St. Charles County also collects ad valorem taxes on real property within St. Charles County.

The St. Peters City Centre ("SPCC") Redevelopment Plan

12. The SPCC Redevelopment Area consists of approximately 581 acres.

13. St. Peters Ordinances 1961 and 1962 authorize the City of St. Peters to collect PILOTS and EATS for the entire area of the SPCC Redevelopment Area.

14. Ordinance No. 1961 incorporates by reference the Plan. A true and correct copy of the Redevelopment Plan is attached to Plaintiffs' Motion for Partial Summary Judgment as Exhibit 6. (LF 527-600)

15. The Plan details facts, findings and information related to "blight" factors in the Act, including the following:

(1) "The Special District portion of the Redevelopment Area is nearly ***devoid of significant infrastructure*** to support the potential development sites which are available." (Redevelopment Plan, p. 7)(LF536)

(2) "[The] ***lack of infrastructure includes roads, water lines, and storm***

and sanitary sewer lines." (p. 7)(LF536)

(3) There exist ***"storm drainage and flooding problems in this area."*** (p.7)(LF536)

(4) The design of the intersection of the South Outer Road and Suemandy Drive ***"creates a serious traffic hazard which is evidenced by the number of accidents which occur at this location."*** (p. 9)(LF538)

5) "The design of this intersection [the intersection of Suemandy and the South Outer Road] and the adjacent roadways represents a major example of defective street layout and represents a situation which endangers the lives and property of the individuals who use these roadways." (p. 9)(LF538)

(6) The situation at the intersection of Suemandy and the South Outer Road "represents not only evidence of defective street layout, conditions which endanger life and property, but also represents an ***unsafe condition***." (p. 9)(LF538)

(7) The "section of South Outer Road east of Suemandy is in ***deteriorated condition***." (p. 10) "The pavement surface [on the South Outer Road] has ***numerous cracks*** (some of which have been filled) ***and other pavement irregularities*** which have begun to make the driving surface rough." (p. 10)(LF539)

(8) "The Special [zoning] District comprises ***approximately 460 acres*** and constitutes the majority of the land area within the Redevelopment

Area. Yet it is ***served by only three roadways***. Two of these are at the perimeter of the area." (p. 10)(LF539)

(9) "Nearly three-fourths of the land area in the Special District and ***more than half of the Redevelopment Area is not served by public roads*** in the form of an internal network." (p. 10)(LF539)

(10) ***"[M]ost of the major sectors of the Special District are not served by roads of any kind."*** (p. 10)(LF539)

(11) "The ***inadequacy of the road system*** serving the Redevelopment Area and particularly the Special District section has severely retarded the growth and development of the area." (p. 10)(LF539)

(12) "There are a ***number of instances*** within the Redevelopment Area that represent the ***deterioration of site improvements on various parcels***." (p. 11)(LF540)

(13) "One such instance [of deterioration of site improvements] is the remaining shell of a single-family residence which was destroyed by a fire.... This ***house is not habitable and probably not repairable***. ***It has been condemned by the City*** in an attempt to effect its removal." (p.11)(LF540)

(14) Further as to deterioration of site improvements, on another site, there is identified ***a vacant building***, another building "showing ***signs of significant deterioration***," an unpaved parking lot showing signs of potholes and washout, a "lean to" type of structure which is deteriorating,

showing signs of rust and discoloration with bent and dented sections. (p. 11-12)(LF540-541)

(15) Further as to deterioration of site improvements, "the unpaved parking of this site is an example of ***a site improvement which is below minimum code standards***."(p. 11)(LF540)

(16) Further as to deterioration of site improvements, the Skelgas bulk propane terminal has ***an unpaved drive and parking lot, in "very poor condition," with major ruts and potholes.*** (p. 12)(LF541)

(17) Further as to deterioration of site improvements, ***the drainage structure*** located on the north and west sides of Suemandy is a 35-foot wide, 10 to 12 foot high structure, including ***deteriorated concrete***, with vegetation growing through the floor of the structure to such an extent as "to afford ***a significant potential to impede the flow of water,***" decreasing the capacity of the structure and creating a potential for ***increased "floodway area in this area and upstream."*** (p. 12)(LF541)

(18) The drainage structure is "extremely tempting for children from nearby subdivisions to play in and around" ... and therefore "represents ***a condition which is a potential danger to life and property and is a potential menace to public safety."*** (p. 12)(LF541).

(19) Further as to deterioration of site improvements, a ***24-inch sanitary sewer line*** extends through the Redevelopment Area, constructed approximately ***20 years ago of fiberglass.*** (p. 13)(LF542)

(20) Further as to deterioration of site improvements, ***"[s]ite fill materials such as soil and other material such as broken concrete, asphalt, bricks and masonry block have been placed on various parcels along the alignment of this [24-inch] sanitary sewer line."*** (p. 13)(LF542)

(21) Further as to deterioration of site improvements, ***no granular backfill was used in installing the 24-inch sanitary line***. (p. 13)(LF542)

(22) Further as to deterioration of site improvements, the ***24-inch sanitary line has collapsed on at least two occasions.*** (p. 13)(LF542)

(23) The situation with the 24-inch sanitary sewer line "represents ***deterioration of a site improvement*** and the presence of ***an unsanitary condition***, as well as a ***potential menace to public health."*** (p. 13)(LF542).

(24) "There are ***many instances*** of property platting in the Redevelopment Area which represent ***obsolete parcel configurations*** for the construction of modern retail and office commercial uses and institutional uses." (p. 13)(LF542).

(25) 12 to 14 parcels in the northwest sector of the Redevelopment Area have "***oddly shaped configurations***, quite often consisting of narrow frontages to existing roadways with parcels that fan out to large areas which are "behind" other parcels." (p. 13). Some of these parcels "have been configured so that the ***depth to width relationship makes development difficult*** in terms of meeting codes and/or using the parcel to is [sic] fullest extent allowable under current codes." (p. 13)(LF542)

(26) "Some of this platting creates parcels which are ***landlocked***." (p. 13)(LF542).

(27) Another instance of obsolete platting "exists in a group of parcels which are in and around the intersection of Spencer and Mexico Roads" which also represent ***oddly shaped configurations***, ***narrow frontages*** compared to depths of parcels and ***landlocked*** parcels. (p.13)(LF542).

(28) The Duello tract's presence (an island of land outside the City limits) and "L" shape "constitute[s] ***obsolete platting***," and "complicate[s] any subsequent resubdivision of the area in some more usable/building configuration." (p. 14)(LF543)

(29) ***Other parcels*** "which ***share many of the same characteristics of obsolete platting*** as those discussed above" are located at the eastern end of the Redevelopment Area. (p. 14)(LF543)

(30) "The land west of the Williams pipeline parcel is subdivided into a number of ***long and narrow parcels***." (p. 14)(LF543)

(31) "Other parcels to the south of [the Williams pipeline parcel] are ***landlocked*** without access to the road network." (p. 14)(LF543).

(32) ***Conditions exist which are below current zoning, signage and building codes,*** such as the building and site improvements at Pool King (unpaved parking areas, lack of landscaping, fencing type, and architecture), the State Farm Building (unpaved parking lot, lack of proper landscaping, and architectural features), six billboards located with the

district and along the South Outer Road (method of construction is not as required, and minimum spacing not met). (p. 14-15)(LF543-44)

(33) ***Excessive vacancies exist in the Redevelopment Area***, including, the over two-year vacancy of a converted house next to the Hamilton Square Development, which has been historically used as a real estate office, a long strip commercial-type building with a history of high tenant turnover and vacancy, and a Hamilton Square building which exhibits "a vacancy rate of about 33% virtually since it was built." (p. 15-16)(LF544-545)

(34) ***Inadequate utilities***, including the fact that ***"only the perimeter of the Redevelopment Area is served by all utilities (water, storm and sanitary sewers, natural gas, electricity, and telephone)"*** requiring for development the construction of"[w]aterline extensions along the Spencer Road Extension ..., and relocation of an existing line," construction of "[s]anitary sewer lines within the Special District and relocation of an existing line," and ***"[m]ore than two-thirds of a mile (3600 feet) of major storm water channel improvements*** of varying magnitude primarily in the western portion of the Redevelopment Area." (p. 16)(LF545).

(35) "[D]uring periods of heavy rain ***there is flooding in the Redevelopment Area*** particularly at the eastern edge of the Mall area…." (p. 16)(LF545)

(36) "There is a ***significant floodway and 100-Year Floodplain*** area

through much of the western third of the Redevelopment Area." (p. 16)(LF545)

(37) As a result of the "the deficiency of the [storm water] system under the highway, there is often flooding of the highway during periods of heavy rain. ***Three times during the last 10 years flooding has resulted in closure of 1-70.*** Of course, this also causes flooding and property damage along the downstream parts of the system in the Redevelopment Area." (p. 17)(LF546)

(38) "***Flooding*** also occurs to the west and the south on the Manning property." (p.17)(LF546).

(39) "Except for the land uses around the periphery of the Redevelopment Area, the "core" of the Redevelopment Area (which is the Special District) is ***vacant..., today much of it is not being used at all. This vacant land area comprises about half of the total acreage within the Redevelopment Area boundaries."*** (p. 19)(LF548).

16. The Plan stated:

The Redevelopment Plan and Projects as provided for in this document are intended to achieve eradication of the blighting factors in existence and cause the development and/or redevelopment of the area through the provision of funds for the following activities:

> Property assembly costs in the acquisition of land and subsequent resale of the land directed at inducing a project in

the form of a long-delayed expansion/completion of Mid Rivers Mall;

Property assembly costs in the acquisition of land and/or subsequent resale of the land, and/or site infrastructure improvements directed at inducing a project for the redevelopment of an area at the southeast quadrant of Suemandy Road and South Outer Road for a major retail redevelopment of the type commonly referred to by developers as a “power” retail center;

Development of a project known as the Rec-Plex. This is the development of a community recreation center facility. This facility will also include the development of the natatorium to be the site of the 1994 Olympic Festival for swimming and diving events;

The construction of needed roadway, water line, and storm and sanitary sewers infrastructure in the Special District portion of the Redevelopment Area to correct inadequate street layout and utilities and alleviate storm water flooding; and

> Inducement of other redevelopment projects (as market conditions and opportunities arise) through funding costs associated with land acquisition, relocation, and/or public improvements for such projects.

Redevelopment Plan, (p. 5)(LF534).

17. The Plan details facts, findings and information related to the Board's finding that the Area would not reasonably be anticipated to be developed without adoption of the Redevelopment Plan, including the following:

(1) The blight factors referenced in the SPCC Redevelopment Plan "contributed to a lack of growth and development in the proposed Redevelopment Area in spite of its central location in the St. Charles County growth corridor." (p. 5)(LF534)

(2) "[F]or a number of years [the City] has attempted to encourage the development of the vacant portions of the Area and the redevelopment of some of the developed sections" without success. (p. 6)(LF535)

(3) "Development in the northern sector of the Special District has not occurred in spite of the overall growth of the City of St. Peters and the inducements/influences initiated by the City and the Missouri State Highway and Transportation Department." (p. 6)(535)

(4) "In 1988 the City developed specific zoning for a portion of the Redevelopment Area. … The City made the initial commitment to the

concept of the Special District by constructing a new City Hall surrounded by extensive parks and recreation facilities on a site of more than 62 acres. These governmental and recreational uses are located along the southern part of the area…." (p. 6)(LF535)

(5) "The Special District portion of the Redevelopment Area is nearly devoid of significant infrastructure to support the potential development sites which are available. As noted previously, this lack of infrastructure includes roads, water tines, and storm and sanitary sewer lines. While there has been developer/investor interest for projects in the area, in final evaluation no such project to date has been able to afford the added cost of the infrastructure. This is compounded by the fact that the Special District zoning requires higher quality buildings and site improvements in keeping with the Downtown image which the City is trying to achieve for this area. Despite aggressive marketing of the Special District by the City's economic development staff, no development of significant magnitude has occurred to date except for the Duchesne Bank and Lutheran High School." (p. 7)

(6) "For more than five years, the City has attempted to encourage the completion of Mid Rivers Mall and to attract retail and service commercial development to the areas adjacent to the Mall on either side of Suemandy Road at the P70 south outer road. The assembly of land, demolition of site improvements and correction of storm drainage and flooding problems in this area have been a consistent impediment to development. Without the

use of eminent domain and financial incentives of the TIF mechanism, the development/ redevelopment of this sector of the Redevelopment Area is not likely to occur. (p. 7)(LF536)

(7) "The inadequacy of the road system serving the Redevelopment Area and particularly the Special District section has severely retarded the growth and development of the area." (p. 10)(LF539)

(8) "[P]roperty owners and prospective developers have been unable to achieve economic feasibility for the projects once the cost of building the roads and related infrastructure is added to the other development costs involved in bringing a project to fruition." (p. 10)(LF539)

(9) "While it is possible that some development will occur, it is likely that development will be of small magnitude…."(p. 43.)(573)

18. The Plan refers to "three redevelopment projects which are envisioned to occur." (Redevelopment Plan, pp. 25-26)(LF554-555), and refers to "Future Redevelopment Projects:"

(1) The REC-PLEX: "This project will consist of development of a new recreation center of approximately 124,000 square feet at the eastern end of the 62-acre tract currently occupied by City Hall and other recreation facilities." (p. 25)(LF554)

(2) Mid-Rivers Mall Expansion: "This will involve the addition of the fourth anchor store which was provided for in the original plan for the mall…. This redevelopment will also include the acquisition of the

'outer ring' parcels to the northeast of the primary mall buildings which are located between Mall Circle Drive, South Outer Road, and Suemandy Road." (p. 26)(LF555).

(3) Retail "Power" Center: "The third redevelopment project planned for the Redevelopment Area will involve the construction of a large retail center to be located on a site anywhere from 27 to 40 acres at the southeast corner of the intersection of South Outer Road and Suemandy Road." (p. 27)(LF556)

(4) Future Redevelopment Projects: "In order to estimate the incremental revenue which may be generated over the life of the Redevelopment Plan, it is necessary to analyze the development potential of the portions of the Redevelopment Area for which there are no identified redevelopment projects at this time. (p. 28)(LF557)

19. "Referred to as the Special District, this zoning district constitutes approximately 84% of the total land area within the boundaries of the Redevelopment Area." Redevelopment Plan, P.6. (LF535)

20. "The Special District comprises approximately 460 acres and constitutes the majority of the land area within the Redevelopment Area." Redevelopment Plan, p. 10 and Plate 3 (LF539) and (LF587).

21. "[M]uch of the Special District, the primary core of the Redevelopment Area, will require the construction of additional utility lines to adequately serve the Area and allow for development to occur." Redevelopment

Plan, p. 16. (LF545)

22. "Except for the land uses around the periphery of the Redevelopment Area, the 'core' of the Redevelopment Area (which is the Special District) is vacant. While some of this land is used for agricultural purposes from time to time, today much of it is not being used at all. This vacant land area comprises about half of the total acreage within the Redevelopment Area boundaries." Redevelopment Plan, p. 19. (LF548)

23. "The large, undeveloped land area comprising the core of the Redevelopment Area (referred to in this document as the core of the Special District) will redevelop over time as projects can be sought to the various tracts. As noted in earlier discussion herein, the development/redevelopment of this area has been stifled by a lack of infrastructure and the means to finance it. Thus, no redevelopment projects are identified for this core area of the Special District at this time." Redevelopment Plan, p. 25. (LF554)

E. <u>SPCC Redevelopment Activity Since Adoption</u>

24. The State of Missouri reports that as of February 1, 2001, 49 municipalities in the State have adopted 125 Plans under the TIF Act.

25. As of September, 2001, the assessed value of the real property in the Area was $19.2 million, on increase of over $15.4 million from the 1991 assessed value of $3.8 million.

26. In the year 1991, a 1% levy generated sales taxes from within the Area of $49,570.64; that same 1% levy in the year 2001 generated $923,783.68 in

revenue.

27. Since and after adoption of the SPCC Redevelopment Plan, St. Peters published Requests for Proposals ("RFP") for developers to participate in redevelopment activities in portions of the SPCC Redevelopment Area.

28. In 1993, St. Peters received responses to RFPs from the Sansone Investment Company and engaged into negotiations with it for redevelopment; in 1995, St. Peters received responses to RFPs from Spencer Creek Development and Landon Development for an entertainment/retail complex and engaged in negotiations with those developers. In 1996, St. Peters entered in to negotiations with Landon Development for the construction of multiscreen movie theatre complex within the SPCC Redevelopment Area. These proposal and negotiations are summarized in St. Peters' 1995 Annual Report to the State regarding the SPCC Redevelopment Area, and in amendments First, Second, and Third to the SPCC Redevelopment Plan.

29. In early 1999, St. Peters entered into negotiations with Costco Wholesale Corporation ("Costco"), and on May 13, 1999, St. Peters and Costco entered into a Redevelopment Agreement securing Costco's participation in the SPCC Redevelopment Plan as the developer of a "power retail" center located within the SPCC Redevelopment Area.

30. Also on May 13, 1999, the Board adopted Ordinance No. 3339 approving the fifth amendment to the Plan, which amendment outlined a redevelopment activity planned for the Area as "an approximately 146,000 square

foot retail facility for [Costco Wholesale Corporation (hereinafter "Costco")] ... and approximately 110,000 square feet of additional high-end retail stores and restaurants" in Sub-Area B of the SPCC Redevelopment Area.

31. In Ordinance No. 3340, the Board authorized and approved the First Amended and Restated Redevelopment Agreement ("Costco Redevelopment Agreement") for development of Sub-Area B of the Area by Costco. A certified copy of Ordinance No. 3340 is attached as Exhibit 7, (LF608) to Plaintiffs' Motion for Partial Summary Judgment.

32. Ordinance 3340 set forth a legal description for the Sub-Area B different from the legal description contained in the Redevelopment Plan.

33. The Costco Redevelopment Agreement involves TIF financing including the use of EATS and PILOTS.

34. The Costco Redevelopment Agreement provides that obligations supporting financing of the redevelopment are payable only from TIF Revenues in the Special Allocation Fund and from Bond Proceeds and from no other source," and the Costco Redevelopment Agreement provides that TIF Revenues under the Costco Redevelopment Agreement includes only those revenues attributable to the increased assessed valuation of Sub-Area B and 50% of additional revenues from taxes generated by economic activity in Sub-Area B. Ordinance No. 3340, Redevelopment Agreement p. 16. (LF629)

35. In April, 2001, Notes were issued secured by the SPCC Special Allocation fund totaling $7,470,000 for expenses incurred by Costco on its

reimbursable project costs in conjunction with the Costco Redevelopment Agreement. In December, 2001, an additional $1,209,000 in Notes were issued. From issuance to September 30, 2002, the holder of the Notes has been paid a total of $212,742 from the SPCC Special Allocation Fund. The Notes were issued and the payments were made for costs incurred for the items listed in Appendix C of the Redevelopment Agreement between Costco and St. Peters, including , but not limited to, property assemblage costs; utility relocation and extensions; construction and reconstruction of roads; traffic control, signalization and improvements to existing public roadways; acquisition of floor protection system right-of-way and flood protection system construction.

36. In the Redevelopment Plan, St. Peters anticipated the cost of the Rec-Plex at $18,000,000. Redevelopment Plan, p.33. (LF562)

37. In November, 1992, St. Peters' voters authorized $16,000,000 in general obligation bonds.

38. In 1993, St. Peters issued its voter-authorized General Obligation Bonds (hereinafter "GO Bonds") in the total amount of $16,000,000, the proceeds of which were pledged toward "the purpose of the acquisition of real estate and the construction, improvement and equipping of multi-purpose recreation facilities and park lands, including a swimming facility, ice rinks, gymnasium, tennis and basketball courts and related improvements," as stated in Ordinance No. 1905.

39. The Redevelopment Plans states that "It is the City's intent to pay for the principal of and interest on the Bonds [for the REC-PLEX], in any given

year, with money legally available for such purpose in the City's Special Allocation Fund." Redevelopment Plan, p. 26 (LF555)

40. "The City plans to pledge tax increment revenues to the retirement of the [GO] bonds." Redevelopment Plan, Appendix C. (LF590)

41. The Plan states: "To the extent that Tax increment Revenues exceeds [sic] the annual debt service on the general obligation bonds, the City will have greater flexibility to finance other projects." Redevelopment Plan, Appendix C. (LF590)

42. Prior to the Costco Redevelopment Agreement, St. Peters employed revenues in the SPCC Special Allocation Fund to retire the GO Bonds and surplus PILOTS in the Special Allocation Fund were distributed to the taxing districts.

43. From inception, the Special Allocation Fund has incurred obligations of $23,126,763, of which financing of the REC-PLEX represents $14,447,763 and financing of the Costco development represents $8,679,000.

44. From inception to September 30, 2002, the Special Allocation Fund has made payments totaling $6,881,160, of which $212,742 represented payments on the Costco Notes, $4,308,615 represented payments toward financing of the REC-PLEX, $1,008,543 represented payments for SPCC Redevelopment Area street improvements, and $1,288,345 represented payments of surplus PILOTS funds to taxing districts.

45. On May 21, 1992, St. Peters entered into a contract with St. Charles County under which the Spencer Road extension would be financed with St.

Charles County Transportation Stales Tax revenues.

46. The Plan states:

> Some of the proposed infrastructure costs (such as the Spencer Road Extension) are identified in the City's capital improvements program and are intended to be funded through sources of revenue other than the incremental revenue generated by the Redevelopment Area. The City contemplates using monies from the Transportation Trust Fund and Water-Sewer Tap-On Fund to pay for such costs.

Redevelopment Plan, p. 34 (LF563).

47. Building by a municipality is development.

48. In 1995, J.C. Penney began construction of a 125,329 square foot store in the TIF District without any TIF assistance. Also in 1995, a 28,000 square foot office building, Executive Centre I, was completed, also without TIF assistance. Also in 1995, another building of about 25,000 square foot owned by Dr. Piper and partners was begun, also without TIF direct assistance.

49. The Redevelopment Plan contemplates the redevelopment with the objectives to "[s]timulate rehabilitation, development, and redevelopment of the Redevelopment Area and environs through private investment,' and contemplated specifically that the REC-PLEX, financed in part by funds from the special allocation fund, would "generate significant 'spinoff' economic benefit" to other businesses in the Redevelopment Area.

50. The REC-PLEX is a municipal property owned by St. Peters on

which St. Peters pays no ad valorem taxes.

51. St. Charles County is and has, since the approval of the SPRCA, distributed PILOTS and EATS to St. Peters pursuant to Ordinances 1961 and 1962.

52. From inception of the SPCC Redevelopment Plan until August 30, 2002, the Special Allocation Fund for the SPCC Redevelopment has received $1,012,510.09 in EATS resulting from sales tax levies on economic activities within the SPCC Redevelopment Area.

53. From the inception of the SPCC Redevelopment Plan until August 30, 2002, St. Charles County has received $1,012,510.09 in sales tax revenues resulting from sales tax levies on economic activities within the SPCC Redevelopment Area.

54. From inception of the SPCC Redevelopment Plan until August 30, 2002, the Special Allocation Fund for the SPCC Redevelopment has received $3,799,167.19 in PILOTS.

55. St. Peters has refunded surplus PILOTS totaling $1,288,345 to taxing districts.

This ends the stipulation.

The St. Charles County Assessor provided an affidavit showing that assessed valuations in the SPCRA had not increased as a result of the construction of the Rec-Plex. (LF 1436-37)(Appendix A1-2)

7. Except where there have been improvements made to a particular

parcel or tract of real estate in the St. Peters Centre Redevelopment Area, the assessed valuation of taxable real property in the St. Peters Centre Redevelopment Area has experienced typical increases for comparable areas of St. Charles County.

8. Said another way, increases in assessed valuation of real property located in the St. Peters Centre Redevelopment Area are similar to increases in assessed valuation in comparable areas of St. Charles County that are outside the Redevelopment Area. If properties in the Redevelopment Area have increased at a higher rate, those higher increases are due to improvements made to the properties in question.

Barbara Walker, the St. Charles County Collector, provided an affidavit setting out the total of all funds paid by St. Charles County to the SPCRA (TIF District 2) at $3,799,167.16, commencing with the first disbursement in 1995 until April 25, 2002. (A 3-6)(LF 805-808).

The trial court found the substantive issues in favor of Defendants, with the exception that the trial court determined that the Plaintiffs had standing to bring this action. (LF 1675-1711). Following the trial court's judgment on the merits, St. Peters filed a motion for attorneys fees and costs. The trial court overruled that motion. (LF1713).

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN FAILING TO GRANT SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS AND FURTHER ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE CITY OF ST. PETERS ON COUNTS I-III OF PLAINTIFFS' PETITION BECAUSE ST. PETERS CANNOT COLLECT PILOTS FROM THE ENTIRE 581 ACRE ST. PETERS CENTRE REDEVELOPMENT AREA ("SPCRA") IN THAT PILOTS ARE SPECIAL ASSESSMENTS AND PILOTS COLLECTED FROM THE SPCRA TO FINANCE THE REC-PLEX PROVIDE NO SPECIAL OR DIRECT ECONOMIC BENEFIT TO PRIVATE LANDOWNERS AS A RESULT OF THE CONSTRUCTION OF THE REC-PLEX.

Section 99.835.1, RSMo, 2000.

Section 99.805**(7)**, RSMo, 2000

Section 99.805(4) RSMo. 2000

Tax Increment Finance Comm'n of Kansas City v. J.E. Dunn Const. Co., Inc., 781 S.W.2d 70, 73 (Mo. banc 1989)

City of Springfield v. Bradley, 744 S.W.2d 559, 560 (Mo. App. 1988)

Crittenden v. Reed, 932 S.W.2d 430, 405 (Mo. banc 1996)

II. THE TRIAL COURT ERRED IN FAILING TO GRANT SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS AND FURTHER ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE CITY OF ST. PETERS ON COUNTS I-III OF PLAINTIFFS' PETITION BECAUSE ST. PETERS NEVER DESIGNATED AN "AREA SELECTED FOR THE REDEVELOPMENT PROJECT" IN ITS ORDINANCES 1961 AND 1962 IN THAT ST. PETERS MERELY DESIGNATED A REDEVELOPMENT AREA AND THE DESIGNATION OF AN AREA SELECTED FOR A REDEVELOPMENT PROJECT IS A CONDITION PRECEDENT TO COLLECTION OF PILOTS AND EATS.

§ 99.820, RSMo 2000

§ 99.845, RSMo 2000

§ 99.805(10), RSMo 2000

ITT Commercial Finance Corp v. Mid-America Marine Supply Corp., 854 S.W.2d 871, 876 (Mo. banc 1993)

Ste. Genevieve School Dist. R-II v. Board of Aldermen of the City of Ste. Genevieve, 66 S.W.3d 6, 11 (Mo. banc 2002)

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF ST. PETERS AND IN FAILING TO GRANT SUMMARY JUDGMENT FOR ST. CHARLES COUNTY ON COUNT IV OF PLAINTIFFS' PETITION BECAUSE § 99.805(7) PERMITS THE USE OF PILOTS FOR PRIVATE USE ONLY IN THAT THE REC-PLEX IS A PUBLIC USE, NOT A PRIVATE USE AND PROVIDES NO BENEFIT TO PRIVATE PROPERTY.

§ 99.805(7), RSMo. 1991

§ 99.810.1(1) RSMo. 2000

§ 99.825.2 RSMo. 2000

Laclede Cab Co. v. Mo. Comm'n on Human Rights, 748 S.W.2d 390, 399 (Mo. App. E.D. 1988)

Tax Increment Finance Comm'n of Kansas City v. J.E. Dunn Const. Co., Inc., 781 S.W.2d 70, 73 (Mo. banc 1989)

State ex rel. St. Louis Housing Authority v. Gaertner, 695 S.W.2d 460, 462 (Mo. banc 1985)

IV. THE TRIAL COURT ERRED IN FAILING TO GRANT SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS AND FURTHER ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE CITY OF ST. PETERS ON COUNT VI OF PLAINTIFFS' PETITION BECAUSE THE ST. PETERS BOARD OF ALDERMAN (A) ACTED IN BAD FAITH; (B) ACTED ARBITRARILY OR (C) IN EXCESS OF ITS AUTHORITY IN CREATING THE SPCRA TIF DISTRICT IN THAT THE SPCRA TIF DISTRICT DOES NOT CONTAIN A PREDOMINANCE OF LAND THAT IS BLIGHTED.

§ 99.805(1), RSMo. 2000

§ 99.805(10), RSMo. 2000

Annbar Associates v. West Side Development Corp., 397 S.W.2d 635, 650 (Mo. banc 1966)

City of Springfield v. Bradley, 744 S.W.2d 559, 560 (Mo. App. 1988)

State ex inf. Dalton v. Land Clearance for Redevelopment Authority of Kansas City, 270 S.W.2d 44, 53 (Mo. banc 1954)

V. THE TRIAL COURT ERRED IN FAILING TO GRANT SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS AND FURTHER ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE CITY OF ST. PETERS ON COUNT VI OF PLAINTIFFS' PETITION BECAUSE THE ST. PETERS BOARD OF ALDERMAN VIOLATED ARTICLE VI, § 27(B) BY ISSUING REVENUE BONDS WITHOUT A VOTE OF THE PEOPLE FOR THE COSTCO PROJECT IN THAT THE BONDS ISSUED WILL NOT BE RETIRED USING LEASE PROCEEDS AND THERE IS NO CONSTITUTIONAL AUTHORITY IN THE CITY OF ST. PETERS TO ISSUE REVENUE BONDS OUTSIDE ARTICLE VI, §§ 27, 27(A) OR 27(B).

MO. CONST. Article VI, § 27(b)

Tax Increment Financing Commission of Kansas City v. J.E. Dunn, 781 S.W.2d 70 (Mo. banc 1989)

Rathjen v. Reorganized School Dist. R-II of Shelby County, 284 S.W.2d 516, 527 (Mo. 1955)

Kansas City v. Fishman, 241 S.W.2d 377, 379 (Mo. 1951)

VI. THE TRIAL COURT ERRED IN FAILING TO GRANT SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS AND FURTHER ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE CITY OF ST. PETERS ON COUNT VIII OF PLAINTIFFS' PETITION BECAUSE § 99.845 VIOLATES ARTICLE VI, §§ 23 AND 25 OF THE CONSTITUTION IN THAT § 99.845 PERMITS ST. PETERS TO USE PUBLIC MONEY TO ASSIST COSTCO.

Article VI, § 23 MO. CONST.

Article VI, § 25 MO. CONST

Tax Increment Financing Commission of Kansas City v. J.E. Dunn Construction Co, 781 S.W.2d 70 (Mo. banc 1989)

County of Jefferson v. Quiktrip, 912 S.W.2d 487 (Mo. banc 1995)

State ex inf. Dalton v. Land Clearance for Redevelopment Authority of Kansas City, 270 S.W.2d 44 (Mo. banc 1954)

VII. THE TRIAL COURT ERRED IN RULING THAT THE STATUTE OF LIMITATIONS BARRED PLAINTIFFS' ACTION BECAUSE THE STATUTE OF LIMITATIONS DOES NOT BAR PLAINTIFFS CAUSES OF ACTION IN THAT PLAINTIFFS TIMELY FILED THEIR CAUSES OF ACTION WITHIN FIVE YEARS OF THE TIME DAMAGES WERE SUSTAINED AND WERE CAPABLE OF ASCERTAINMENT AND BECAUSE THE PERIODIC DEMANDS FOR PAYMENT BY ST. PETERS CONSTITUTES A CONTINUING WRONG.

§ 516.100, RSMo 2000

D'Arcy & Assoc. Inc., v. KPMG Peat Marwick LLP, 129 S.W.3d 25, 29 (Mo. App. W.D. 2004)

Janssen v. Guaranty Land Title Co., 571 S.W.2d 702, 705 (Mo. App. 1978)

City of Velda City v. Williams, 98 S.W.3d 880 (Mo. App. E.D. 2003)

VIII. THE TRIAL COURT ERRED IN RULING THAT THE STATUTE OF LIMITATIONS BARRED PLAINTIFFS' ACTION BECAUSE THE STATUTE OF LIMITATIONS DOES NOT BAR PLAINTIFFS CAUSES OF ACTION IN THAT EACH YEAR'S DEMAND BY ST. PETERS FOR PILOTS AND EATS IS A CONTINUING WRONG EXTENDING THE STATUTE OF LIMITATIONS UNDER §516.100 FOR AN ADDITIONAL FIVE YEARS.

§ 516.100, RSMo 2000

Estell v. Estate of Iden, 714 S.W.2d 774, 777 (Mo.App. E.D. 1986)

American Surety Co. of New York v. Fruin-Bambrick Construction Co., 166 S.W. 333 (Mo. App. 1914)

Roberts v. Neale, 114 S.W. 1120 (Mo. App. 1909)

IX. THE TRIAL COURT ERRED IN RULING THAT THE DOCTRINES OF LACHES, ESTOPPEL, AND WAIVER BAR PLAINTIFFS' CAUSES OF ACTION BECAUSE:

(A) ST. PETERS FAILED PROPERLY TO PLEAD ITS AFFIRMATIVE DEFENSES IN THAT ST. PETERS FAILED TO PLEAD FACTS IN SUPPORT OF THE AFFIRMATIVE DEFENSES AS REQUIRED BY RULES 55.07, 55.08; AND 55.11; AND

(B) THE DOCTRINES OF LACHES, ESTOPPEL AND WAIVER DO NOT APPLY IN THIS CASE IN THAT PLAINTIFFS TIMELY FILED THEIR CAUSES OF ACTION AND DEFENDANT ST. PETERS DID NOT RELY ON ASSURANCES FROM ST. CHARLES COUNTY IN CREATING THE SPCRA AND DEFENDANT ST. PETERS DID NOT CHANGE ITS POSITION IN RELIANCE ON ST. CHARLES' ACTS.

ITT Commercial Finance Corp. 854 S.W.2d at 383-84 (Mo. banc 1993)

Reinecke v. Kleinheider, 804 S.W.2d 838, 841 (Mo.App.1991).

Missouri Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 811 S.W.2d 28, 34 (Mo. App. 1991)

ARGUMENT

I. The Trial Court Erred in Failing to Grant Summary Judgment in Favor of Plaintiffs and Further Erred in Granting Summary Judgment in Favor of the City of St. Peters on Counts I-III of Plaintiffs' Petition Because St. Peters Cannot Collect PILOTS from the Entire 581 Acre St. Peters Centre Redevelopment Area ("SPCRA") in that PILOTS are Special Assessments and PILOTS collected from the SPCRA to Finance the Rec-Plex Provide No Special or Direct Economic Benefit to Private Landowners as a Result of the Construction of the Rec-Plex.

Standard of Review

This is an appeal of an order of the trial court granting summary judgment. The material facts are not in dispute. Review of summary judgment is "essentially de novo…. The propriety of summary judgment is purely an issue of law. As the trial court's judgment is founded on the record submitted and the law, an appellate court need not defer to the trial court's order granting summary judgment." ITT Commercial Finance Corp v. Mid-America Marine Supply Corp., 854 S.W.2d 871, 876 (Mo. banc 1993).

Introduction

This Point addresses Counts I-III of the Plaintiffs' petition. (LF 9-35). Counts I-III do not challenge the legality of the creation of the SPCRA. Instead, they challenge the collection of payments in lieu of taxes ("PILOTS") and economic activities taxes ("EATS") under ordinances that do not comply with the TIF Act's conditions precedent to the collection of PILOTS and EATS.

Point I raises a question of first impression: Whether a City is authorized to adopt tax increment financing to pay for the construction and maintenance of a city-owned, public facility? Put in more broad and more stark terms, the question is whether a city is authorized to redirect ad valorem and sales tax funds due a county or other taxing district (such as a school district) to finance a city-owned and operated recreation facility, or for that matter, a city hall, or a city's police department headquarters? Here, St Charles County's general sales taxes, transportation sales taxes, capital improvements sales taxes and ad valorem taxes have been diverted to the use of the City of St. Peters for a purely municipal purpose.

PILOTS are special assessments. Tax Increment Finance Comm'n of Kansas City v. J.E. Dunn Const. Co., Inc., 781 S.W.2d 70, 73 (Mo. banc 1989). Special assessments may only be collected from property that receives direct and substantial benefit for the assessment collected. 14 McQuillin, MUNICIPAL CORPORATIONS § 38.32, p. 151 (3rd ed. rev'd. 1998). Accord, City of Springfield

v. Bradley, 744 S.W.2d 559, 560 (Mo. App. 1988), City of Webster Groves v. Taylor, 321 Mo. 955, 959, 13 S.W.2d 646, 647 (1929). Because St. Peters used TIF financing to fund the Rec-Plex, PILOTS were used to benefit the entire community -- not simply the land from which the PILOTS were collected -- St. Peters has violated the TIF Act, specifically §99.845. Indeed, because the only improvement financed by PILOTS and EATS was to public land, the improved property cannot generate any PILOTS at all, as public land does not pay ad valorem taxes.

The Court will recall that grants of power to municipalities are strictly construed. A municipality may do no more than it is expressly authorized to do by the legislature.

> [T]he powers of public subdivisions of the State are limited to those expressed or implied by statute, and any doubt is construed against the grant of power. State ex rel. St. Louis Housing Authority v. Gaertner, 695 S.W.2d 460, 462 (Mo. banc 1985). Municipalities are creatures of statute and only have the powers granted them by the legislature. State ex rel. Mitchell v. City of Sikeston, 555 S.W.2d 281, 288 (Mo. banc 1977). Courts generally follow a strict rule of construction when determining the powers of municipalities. Id.

Burks v. City of Licking, 980 S.W.2d 109, 111 (Mo. App. S.D. 1998).

Rules of Statutory Construction

The rules relating to statutory construction are well known to this Court. They are repeated here for the Court's convenience as this case involves the construction of statutes adopted by the General Assembly to permit tax increment financing of areas designated (as here) as blighted.

The purpose of legislative construction is to determine the intent of the legislature. Spudich v. Director of Revenue, 745 S.W.2d 677, 680 (Mo. banc 1988). Where the legislature provides definitions for the terms its uses, those definitions control the meaning of the words and phrases used by the General Assembly. St. Louis Country Club v. Administrative Hearing Comm'n, 657 S.W.2d 614, 617 (Mo. banc 1983). Where the language of the statute is clear and unambiguous, there is no need for interpretation. Wolff Shoe Co. v. Director of Revenue, 762 S.W.2d 29, 31 (Mo. banc 1988). The Court must simply apply the legislature's intent as a matter of law.

Overview of Tax Increment Financing

> Tax increment financing begins with the premise that redeveloped property will pay more taxes than blighted property which remains undeveloped. The act allows political subdivisions to capture the difference between real estate taxes on property before redevelopment and real estate taxes paid after redevelopment occurs

> and to dedicate such taxes to the "special allocation fund." The taxes diverted into the special allocation fund are designated payments in lieu of taxes ["PILOTS"] and specifically allocated "for a private use."

R. KING, *The Continuing Battle to Curb Urban Blight and the Use of Economic Activity Taxes*," 51 J. Mo. B. 332, 333 (1995). See also, generally, Comment, *Tax Increment Financing for Redevelopment in Missouri: Beauty and the Beast,* 54 UMKC L.REV. 77 (1985).

This Court described the operation of the TIF Act as follows:

> To provide funding for the acquisition of property and other permitted project costs, a municipality is to issue "[o]bligations secured by the special allocation fund ... for the redevelopment project area ... to provide for redevelopment project costs." Section 99.835.1. The Act contemplates that improvements in the district will result in an increased assessed valuation of the property within the redevelopment area. Thus, each year that the post-plan assessed value of the taxable real property within the redevelopment project area exceeds the pre-plan assessed value, taxes on the increase in assessed value are abated. In place of taxes, the taxpayer makes payments in lieu of taxes (PILOTS). The PILOT is equal to the amount of tax that would have been collected on the **increased assessed valuation of the property *after improvements***. The

> PILOTS are paid into the special allocation fund which is pledged as security for the bonds issued by the municipality. Section 99.835.1, RSMo, 2000.

Tax Increment Finance Comm'n of Kansas City v. J.E. Dunn Const. Co., Inc., 781 S.W.2d 70, 73 (Mo. banc 1989)(emphasis added). PILOTS thus require improvements to the property from which PILOTS are collected. This is the reason PILOTS are project specific and not collectible from property that does not have improvements.

In 1990 the General Assembly permitted the further diversion of tax revenues to include EATS. EATS are incremental increases in sales taxes that may be collected from "within the area of the redevelopment ***project***." Section 99.845.2 & 3, RSMo 2000 (emphasis added).

Relevant Statutory Provisions[1]

This case involves technical financing concepts that are carefully outlined by the legislature to prevent the very abuse that occurred in this case. The following definitions found in the Tax Increment Financing ("TIF") Act are

[1] Unless otherwise noted, statutory references are to RSMo 1991 Cum Supp., the statutes in effect at the time of the adoption of the SPCRA. Where a later version of the statutes is cited, the statutory language has remained the same, unless noted.

among the limits placed on cities adopting tax increment financing germane to this case:

> **Section 99.805(7)**, RSMo, 2000 **"Payment in lieu of taxes"**, those estimated revenues from real property in the area selected for a redevelopment project, which revenues according to the redevelopment project or plan are to be used for a private use, which taxing districts would have received had a municipality not adopted tax increment allocation financing, and which would result from levies made after the time of the adoption of tax increment allocation financing during the time the current equalized value of real property in the area selected for the redevelopment project exceeds the total initial equalized value of real property in such area until the designation is terminated pursuant to subsection 2 of section 99.850;
>
> **Section 99.805(4)**, RSMo Supp. 1997[2]: **"Economic activity taxes"**, the total additional revenue from taxes which are imposed by a municipality and other taxing districts, and which are generated by economic activities within a redevelopment area over the amount of such taxes generated by economic activities within such redevelopment area in the calendar year prior to the adoption of the

[2] The legislature permitted the collection of EATS in 1991, but did not statutorily define them until 1997.

ordinance designating such a redevelopment area, while tax increment financing remains in effect, ….

Section 99.805(9), RSMo, 2000: "**Redevelopment area**", an area designated by a municipality, in respect to which the municipality has made a finding that there exist conditions which cause the area to be classified as a blighted area…;

Section 99.805(8), RSMo, 2000: "**Redevelopment plan**", the comprehensive program of a municipality for redevelopment intended by the payment of redevelopment costs to reduce or eliminate those conditions, the existence of which qualified the redevelopment area as a blighted area, conservation area, economic development area, or combination thereof, and to thereby enhance the tax bases of the taxing districts which extend into the redevelopment area. Each redevelopment plan shall conform to the requirements of section 99.810;

Section 99.805(10), RSMo, 2000 "**Redevelopment project**", any development project **within a redevelopment area** in furtherance of the objectives of the redevelopment plan; any such redevelopment project shall include a **legal description of the area selected for the redevelopment project;** ….

(Emphasis added.)

These definitions explain the meaning of terms used in the TIF Act. They contain no authority for a city to do anything. Only Section 99.845, RSMo, 2000 provides specific, limited authority in a municipality to collect PILOTS and EATS, and then only "in the area selected for a redevelopment project."

> **Section 99.845.1**, RSMo, 2000. A municipality … may adopt tax increment allocation financing by passing an ordinance providing that after the total equalized assessed valuation of the taxable real property **in a redevelopment project** exceeds the certified total initial equalized assessed valuation of the taxable real property in the redevelopment project, the ad valorem taxes, and payments in lieu of taxes, if any, arising from the levies upon taxable real property **in such redevelopment project** by taxing districts and tax rates determined in the manner provided in subsection 2 of section 99.855 each year after the effective date of the ordinance until redevelopment costs have been paid shall be divided as follows:
>
> (1) That portion of taxes, penalties and interest levied upon each taxable lot, block, tract, or parcel of real property which is attributable to the initial equalized assessed value of each such taxable lot, block, tract, or parcel of real property **in the area selected for the redevelopment project** shall be allocated to and, when collected, shall be paid by the county collector to the

respective affected taxing districts in the manner required by law in the absence of the adoption of tax increment allocation financing;

(2) Payments in lieu of taxes attributable to the increase in the current equalized assessed valuation of each taxable lot, block, tract, or parcel of real property **in the area selected for the redevelopment project** and any applicable penalty and interest over and above the initial equalized assessed value of each such unit of property **in the area selected for the redevelopment project** shall be allocated to and, when collected, shall be paid to the municipal treasurer who shall deposit such payment in lieu of taxes into a special fund called the "Special Allocation Fund" of the municipality for the purpose of paying redevelopment costs and obligations incurred in the payment thereof. Payments in lieu of taxes which are due and owing shall constitute a lien against the real estate of the redevelopment ***project*** from which they are derived and shall be collected in the same manner as the real property tax, including the assessment of penalties and interest where applicable. The municipality may, in the ordinance, pledge the funds in the special allocation fund for the payment of such costs and obligations and provide for the collection of payments in lieu of taxes, the lien of which may be foreclosed in the same manner as a special assessment lien as provided in section 88.861, RSMo….

2. In addition to the payments in lieu of taxes described in subdivision (2) of subsection 1 of this section, … fifty percent of the total additional revenue from taxes, penalties and interest imposed by the municipality, or other taxing districts, which are generated by economic activities within the area of the redevelopment ***project*** over the amount of such taxes generated by economic activities within the area of the redevelopment ***project*** in the calendar year prior to the adoption of the redevelopment project by ordinance, while tax increment financing remains in effect, . . . shall be allocated to, and paid by the local political subdivision collecting officer to the treasurer or other designated financial officer of the municipality, who shall deposit such funds in a separate segregated account within the special allocation fund.…

Argument

A. St. Peters cannot collect PILOTS from the entire 581 acre St. Peters Centre Redevelopment Area in that PILOTS are Special Assessments and PILOTS collected from the SPCRA to Finance the Rec-Plex Provide No Special or Direct, Substantial Economic Benefit to Private Landowners as a Result of the Construction of the Rec-Plex.

Tax Increment Financing Comm'n of Kansas City v. J.E. Dunn Const. Co., 781 S.W.2d 70, 77 (Mo. banc 1989) provides:

> [Payments in Lieu of Taxes] PILOTS are special assessments levied against the property in the District ***for the improvements provided that property under a redevelopment plan.*** See County of Fresno v. Malmstrom, 94 Cal.App.3d 974, 156 Cal.Rptr. 777, 782 (1979) ("Special assessments are not general taxes but rather *used to confer special benefit upon the parcels charged for the improvements*.") The fact that the PILOTS are measured by the assessed value of the property does not change their character as special assessments. See State ex rel. Webster Groves Sanitary Sewer District v. Smith, 115 S.W.2d 816, 822 (Mo. banc 1938) (Assessments may be expressed as a proportion of the assessed valuation of the property.)

Id. (Emphasis added). "[S]pecial assessments are not general taxes but rather [are] used to confer special benefit upon the parcels charged for the improvements" provided to the specific property. Id. (emphasis added). Thus, PILOTS "are not taxes."

The character of PILOTS as special assessments, not taxes, is the *sine qua non* of the constitutionality of PILOTS under Article VI, § 26(b) MO CONST. Id. This is because special assessments are valid only to the extent that they are collected from property that receives a direct and substantial benefit from the funds collected.

> [S]pecial assessments can be sustained only upon the theory that the property assessed receives some special benefit from the improvement differing from the benefit that the general public enjoys….
>
> Special benefits are those which the property assessed receives, due to the improvements, in excess of the general public benefit. Remote or contingent benefits enjoyed by the general public will not sustain such assessment.
>
> The evaluation of the benefit to the parcel need not look only to how the land is presently being used. If the improvement generally enhances the value of the property, the special assessment may be made.

14 McQuillin, MUNICIPAL CORPORATIONS § 38.32, p. 151 (3rd ed. rev'd. 1998). Accord, City of Springfield v. Bradley, 744 S.W.2d 559, 560 (Mo. App. 1988), City of Webster Groves v. Taylor, 321 Mo. 955, 959, 13 S.W.2d 646, 647 (1929) ("special or local assessments are valid only when they are imposed to pay for improvements clearly conferring special benefits upon the property assessed, and the benefits must be substantial, certain and capable of being realized within a reasonable time").

Special assessments will not be upheld unless property receives an increase in value from improvements financed with the special assessment. Sears v. City of Columbia, 660 S.W.2d 238, 260 (Mo. App. 1983)("[n]othing is a benefit which

doesn't enhance the value of the property").

> It is well settled by the decisions of this court, that assessments like those sued on are not regarded as a tax, but as an ***assessment for improvements***, and are not considered as a burden, but as an equivalent or compensation for the enhanced value which the property derived ***from the improvement***. Sheehan vs. The Good Samaritan Hospital, 50 Mo., 155,

City of St. Louis v. Allen, 53 Mo. 44 (1873)(1873 WL 7939 at 6)(Emphasis added).

Where a purported special assessment provides no special benefit to the property assessed, the amount levied against the property is not a special assessment, but is a tax. Crittenden v. Reed, 932 S.W.2d 430, 405 (Mo. banc 1996).

In holding that PILOTS are special assessments, Dunn understands the limitation on the use of PILOTS imposed by the TIF Act.

- Dunn interprets the Tax Increment Financing Act to permit a municipality to levy PILOTS only "against the property in the District for the improvements provided that property under a redevelopment plan." Id., 781 S.W.2d at 77. (emphasis added).
- PILOTS must be directly related to improvements to real property financed by PILOTS. "The PILOT is equal to the amount of tax that

would have been collected on the increased assessed valuation of the property after improvements." Id. at 73.

- PILOTS can only be collected "during the time the current equalized value of real property in the area selected for the redevelopment project exceeds the total initial equalized value of real property in such area." § 99.805. Because PILOTS are special assessments, they may be legally collected only when actual improvements to specifically identified property result in an enhanced value for ad valorem tax purposes. Sears, 660 S.W.2d at 260 ("[n]othing is a benefit which doesn't enhance the value of the property").
- PILOTS are project-specific (as opposed to redevelopment area-wide); that is, § 99.845 permits collection of PILOTS only "in the area selected for the redevelopment ***project*** ." (Emphasis added).
- The TIF Act makes clear that "the area selected for the redevelopment project shall include only those parcels of real property and improvements thereon substantially benefited by the proposed redevelopment project improvements." Section 99.820.1. RSMo. 2000 The words of § 99.820.1 that "the area selected for the redevelopment project shall include only those parcels of real property and improvements thereon substantially benefited by the proposed redevelopment project improvements" are legal code words describing the requirements for a legally valid special assessment. See, Estate of

Huskey v. Moore, 674 S.W.2d 205, 210 (Mo. App. 1984) ("it is … presumed that the legislature enacted legislation in accord with the law as declared by the courts").

- "Redevelopment projects" are defined to include only specific improvements "within a redevelopment area" and must be clearly identified by a "legal description of the area selected for the redevelopment ***project***." § 99.805(10)(emphasis added).
- Section 99.845.1(2) specifically recognizes that PILOTS are special assessments. "[C]ollection of payments in lieu of taxes, the lien of which may be foreclosed in the same manner as a special assessment lien as provided in section 88.861, RSMo." (Emphasis added).

These TIF Act limitations for collection of PILOTS from "the area selected for the redevelopment project" exist to assure that PILOTS remain special assessments and do not become taxes and that both EATS[3] and PILOTS will be

[3] Economic activity taxes ("EATS") similarly may only be collected from "the area selected for a redevelopment project." Section 99.845.2 & 3 thus permits collection of EATS only from those "parcels of real property and improvements thereon substantially benefited by the proposed redevelopment project improvements." § 99.820.1. Thus, collection of EATS from the entire 581 acres of the SPCRA was likewise contrary to the specific and limited legal authority granted St. Peters by the TIF Act.

collected only from real property directly benefited by the expenditures of these revenues.

St. Peters' decision to collect PILOTS for the entire 581 acres of the SPCRA to fund the Rec-Plex is contrary to the law for at least two reasons:

First, there has been no direct and substantial benefit to the property against which PILOTS are levied. The undisputed St. Charles County Assessor's affidavit in favor of St. Charles County's summary judgment motion showed that as a matter of fact the construction of the Rec-Plex did not create a direct economic or special benefit to property within the SPCRA. The special assessments known as PILOTS added nothing to property owners' values. (See, LF 1169-1170 and Appendix A-1).

Second, construction of a public facility like the Rec-Plex cannot be accomplished with special assessments/PILOTS. This is because such public facilities do not improve or enhance the value of the specific property from which EATS and PILOTS are collected. Projects that serve the entire city and county may be "a legitimate and laudable exercise of governmental power for the general [benefit] of the community at large, but [recreation centers] are not constructed primarily to enhance the value of the real estate surrounding them." Heaven v. King County Rural Library District, 404 P.2d 453, 458 (Wash. banc 1965).

Consistent with the black letter law, and with the rationale expressed in Webster Groves, courts properly reject special assessments to pay for public

libraries, Heaven, and a public auditorium, Lipscomb v. Lenon, 276 S.W. 367 (Ark. 1925). Such facilities serve the public at large, but not the interests of specific property. "The contribution which an auditorium makes to such prosperity is general to the entire community and not peculiar and special to the real property." Lipscomb.

St. Peters admits the general, not special, benefit the Rec-Plex would provide in its Redevelopment Plan.

> This recreation complex will serve the residents of St. Peters and St. Charles County. In addition, it will be made available to the area schools for classes and team competition. However, this facility will contain facilities, which will have far broader positive impact for the City, the St. Louis area and even the United States. This facility is to be the site of the 1995 Olympic Festival swimming and diving events. It is likely that the facility will also serve to provide a major training and competition location for swimming athletes from all over the area as well as St. Peters. The ice arena component will be the only indoor ice rink in St. Charles County. (LF 211-212)

EATS similarly may only be collected from "the area selected for a redevelopment project." Section 99.845.3 thus permits collection of EATS only from those "parcels of real property and improvements thereon substantially benefited by the proposed redevelopment project improvements." § 99.820.1.

Thus, collection of EATS from the entire 581 acres of the SPCRA was likewise contrary to the specific and limited legal authority granted St. Peters by the TIF Act, specifically § 99.845.2 & 3.

In sum, § 99.845 limits collection of PILOTS and EATS to "the area selected for the redevelopment project" to assure that PILOTS remain special assessments and do not become taxes and that both EATS and PILOTS will be collected only from real property directly benefited by the expenditures of these revenues. By collecting PILOTS and EATS from property that did not receive direct and substantial improvements, St. Peters violated the TIF Act, specifically § 99.845, in collecting PILOTS and EATS.

Conclusion

The trial court erred in sustaining the motion for summary judgment in favor of St. Peters and in overruling the Plaintiffs' motion for summary judgment on Counts I – III. This Court may correct this error by entering the order the trial court should have entered, Rule 84.14, or remand to the trial court for entry of appropriate orders.

II. The Trial Court Erred in Failing to Grant Summary Judgment in Favor of Plaintiffs and Further Erred in Granting Summary Judgment in Favor of the City of St. Peters on Counts I-III of Plaintiffs' Petition Because St. Peters Never Designated an "Area Selected for the Redevelopment Project" in its Ordinances 1961 and 1962 in that St. Peters Merely Designated a Redevelopment Area and the Designation of an Area Selected for a Redevelopment Project is a Condition Precedent to Collection of PILOTS and EATS.

Standard of Review

As previously expressed, review of the trial court's decision is *de novo*. ITT Commercial Finance Corp v. Mid-America Marine Supply Corp., 854 S.W.2d 871, 876 (Mo. banc 1993).

Introduction

Point II addresses the issue whether a 581 acre area, which is designated only as a "redevelopment area" by a city, can become a single redevelopment project area even though not so designated in the authorizing ordinance. It further raises the issue whether St. Peters may collect PILOTS and EATS from areas to which no improvements are made and which are not specifically designated as redevelopment project areas in the city ordinances.

The brief answer is found in Ste. Genevieve School Dist. R-II v. Board of Aldermen of the City of Ste. Genevieve, 66 S.W.3d 6, 11 (Mo. banc 2002). "The very nature of TIF financing is that it funds the redevelopment of a particular parcel of property by abating increases in the property taxes on that parcel for a period of time determined by the costs of the redevelopment project." (Emphasis added).

A. St. Peters never designated an "area selected for the redevelopment project" in its Ordinances 1961 and 1962 and instead merely designated a "redevelopment area". A designation of a "redevelopment project" is a condition precedent to collection of PILOTS and EATS.

St. Peters has collected PILOTS and EATS under its Ordinance Nos. 1961 (LF 169-175) and 1962 (LF 176-180) without ever defining or declaring a redevelopment project. As previously argued, Plaintiffs do not challenge the facial legality of the ordinances creating the SPCRA. Instead, Plaintiffs assert that St. Peters had not authority to collect PILOTS and EATS under the ordinances. ***Collection*** of PILOTS and EATS is not authorized under the TIF Act until (1) St. Peters designates a project, § 99.845; (2) defines its scope by the use of a legal description that limits the project to real estate that will receive a substantial benefit from the use of PILOTS and EATS, § 99.820; and (3) uses the words "redevelopment project" to identify the area from which it will collect EATS and PILOTS. § 99.845. St. Peters' ordinances failed all three of these requirements.

These words are not mere formalities. When used in the ordinance, they provide notice to taxpayers and to taxing authorities of two important events: First, they reveal what properties will be paying PILOTS and EATS; second, they reveal the uses to which PILOTS and EATS will be put.

In failing even to use the words "redevelopment project" when it described the area, St. Peters further failed to notify anyone that the entire 581 acres would be the source of TIF revenues.[4] Indeed, until December, 1996, TIF collections were small and could have come from a smaller area than the entire SPCRA. (LF 168).

The trial court held that the entire 581 acres was meant to be a single redevelopment project. If this is so "the area selected for a redevelopment project" includes more than "those parcels or real property and improvements thereon substantially benefited by the proposed redevelopment project," § 99.820, since it is undisputed[5] that the Rec-Plex did not enhance the value of property in the SPCRA at all. To hold that the entire SPCRA is a single project is to admit that the PILOTS collected there are not special assessments at all, but a general tax.

[4] St. Peters also failed to inform Plaintiffs that PILOTS and EATS would be used for a purely public purpose -- construction of the Rec-PLex.

[5] Appendix A-1-2; LF 1169 - 1170 affidavit of St. Charles Assessor Eugene Zimmerman.

Crittenden, 932 S.W.2d at 405. Collection of PILOTS and EATS from the entire SPCRA thus violates the TIF Act.

St. Peters Ordinance No. 1962 describes the entire redevelopment area for the SPCRA (the "Area.") The ordinance then proceeds to authorize the City of St. Peters to collect PILOTS and EATS for the entire Area contrary to the authority granted the City by the TIF Act.

If one compares the language of Ordinance 1962 with the authority to collect PILOTS and EATS set out in § 99.845, the unlawful character of the ordinance becomes plain.

Section 99.845	**Ordinance 1962 LF 176-180**
.1 A municipality, … may adopt tax increment allocation financing by passing an ordinance providing that after the total equalized assessed valuation of the taxable real property ***in a redevelopment project*** exceeds the certified total initial equalized assessed valuation of the taxable real property ***in the redevelopment project***, …. (emphasis added)	**Section 4.** The Board of Aldermen of the City of St. Peters, Missouri hereby determines in accordance with the Act that after the total equalized assessed valuation of the taxable real property ***in the Area*** exceeds the certified total initial equalized assessed valuation of all taxable real property ***in such Area*** …. (Emphasis added).

.1(2) Payments in lieu of taxes *attributable to the increase in the current equalized assessed valuation of each taxable lot, block, tract, or parcel of real property* ***in the area selected for the redevelopment project*** and any applicable penalty and interest over and above the initial equalized assessed value of each such unit of property in the ***area selected for the redevelopment project*** shall be allocated to and, when collected, shall be paid to the municipal treasurer who shall deposit such payment in lieu of taxes into a special fund called the "Special Allocation Fund" of the municipality for the purpose of paying redevelopment costs and obligations incurred in the payment thereof. (Emphasis added).	**Section 4(b):** Payments in lieu of taxes (as that term is used and defined in Section 99.805(7) of the Act) *attributable to the increase in the current equalized assessed valuation of each taxable lot, block, tract, or parcel of real property* ***of the Area*** over and above the initial equalized assessed value of each such unit of property in the ***Area*** shall be allocated to and, when collected, shall be paid to the Treasurer of the City of St. Peters, Missouri and shall be deposited into a special fund to be designated as the "Special Allocation Fund" of the City of St. Peters, Missouri for the purpose of paying redevelopment costs and obligations incurred in the payment thereof. (Emphasis added).
.2 [F]ifty percent of the total additional	**Section 4(c):** In addition, fifty

revenue from taxes, penalties and interest which are imposed by the municipality or other taxing districts, and which are *generated by economic activities* ***within the area of the redevelopment project*** over the amount of such taxes generated by economic activities ***within the area of the redevelopment project*** in the calendar year prior to the adoption of the redevelopment project by ordinance, … shall be allocated to, and paid by the local political subdivision collecting officer to the treasurer or other designated financial officer of the municipality, who shall deposit such funds in a separate segregated account within the special allocation fund.

percent of the total additional revenue from taxes, penalties and interest which are imposed by the City or other taxing districts and which are *generated by economic activities* ***in the Area*** over the amount of such taxes generated by economic activities ***within the Area*** in the calendar year 1991, but excluding taxes imposed on sales or charges for sleeping rooms paid by transient guests of hotels and motels, licenses, fees or special assessments and person property taxes other than payments in lieu of taxes, shall be allocated to, and paid by the collecting officer, to the Treasurer of the City, which shall deposit such funds in a separate segregated account within the Special Allocation Fund. (Emphasis added).

That St. Peters intended to and did collect PILOTS and EATS from the entire redevelopment area without regard to a specific project – and did not intend to collect PILOTS and EATS only from an area selected for a redevelopment project – is also made clear in Sections 8 (a)-(c) of Ordinance 1962. (LF 178-179)

> Section 8. The moneys in the Special Allocation Fund and the various Accounts and Subaccounts therein shall be applied in the following order of priority:
>
> (a) There shall be deposited into the Tax Account, as and when received, fifty percent of the total additional revenue from taxes imposed by the City, or other taxing districts, which are generated by economic activities ***within the Area*** *[§ 99.845.1 reads "within the area of the redevelopment project"]* over the amount of such taxes generated by economic activities within the area in calendar year 1991 (but excluding (i) taxes imposed on sales or charges for sleeping rooms paid by transient guests of hotels and motels, (ii) licenses, fees or special assessments, (iii) personal property taxes, (iv) the City's Transportation Tax; and (v) the Transportation Tax and the Capital Improvements Tax of St. Charles County, Missouri;
>
> (b) There shall be deposited into the Pilots Account, as and when received, payments in lieu of taxes as further defined in

Section 99.845 of the Act (the "Pilots") ***derived from all taxable lots, blocks, tracts and parcels of real property in the Area***; **[**§ 99.845 reads *"attributable to the increase in the current equalized assessed valuation of each taxable lot, block, tract, or parcel of real property in the area selected for the redevelopment project"***]**

(c) There shall be deposited into the Surplus Account, as and when received, (i) fifty percent of the total additional revenue from the City's Transportation Tax, and the Transportation Tax and the Capital Improvements Tax of St. Charles County, Missouri, which are generated by economic activities ***within the Area*** **[**§ 99.845 reads: *"within the area of the redevelopment project"***]** the over the amount of such taxes generated by economic activities within the area in calendar year 1991 and (ii) any amounts remaining on the last Business Day of each Fiscal Year in the Pilots Account and the Tax Account which have not been applied in accordance with subsection (d) hereof, which shall be distributed by the Treasurer on the last Business Day of each Fiscal Year to the respective taxing districts in the same manner and proportion as the most recent distribution by the collector of taxes to the affected districts of real property taxes from real property in the Area.

(Emphasis added.)

Moreover, neither Ordinance 1961 nor Ordinance 1962 provide a legal description for any redevelopment project as required by § 99.805(10). Instead, the Redevelopment Plan describes generally three redevelopment projects – the Rec-Plex, the Mid-Rivers Mall Expansion and a Retail Power Center. (LF 211-229). The Redevelopment Plan is no more specific than saying that three projects are "envisioned" (LF 211). The Plan also admits that

> The large undeveloped land area comprising the core of the Redevelopment Area (referred to … as the core of the Special District) will redevelop over time as projects can be sought for the various tracts. … [N]o redevelopment projects are identified for this core area of the Special District at this time.

(LF 211).

The Plan does not include separate legal descriptions for these projects, however, as required by § 99.805(10). The purpose of the limitation imposed by § 99.805(10) is two-fold: First, proper designation provides notice to those persons who might be subject to the special assessment of their exposure to additional government fiats. Second, the limitation assures the other taxing districts that PILOTS and EATS will be collected only from those areas that will be directly improved by the project – thus resulting ultimately in increased tax revenues to those subdivisions from the completed project.

The only legal description contained in either Ordinance or in the Redevelopment Plan incorporated into Ordinance 1961 is of the entire TIF District, the vast majority of which (84%) (LF 192) has no projects planned.

By failing to designate an "area selected for the redevelopment project" in its Ordinances 1961 and 1962 and in collecting EATS and PILOTS from the entire St. Peters Centre Redevelopment Area instead of collecting PILOTS and EATS from only the real property directly and substantially benefited by the collection of PILOTS and EATS, St. Peters collected EATS and PILOTS from a broader area than permitted by § 99.845.

Ironically, when St. Peters wanted to segregate PILOTS and EATS collected for the Costco project from PILOTS and EATS collected from the remainder of the SPCRA to preserve its Rec-Plex funding, it passed additional ordinances that carefully defined the redevelopment project and the area selected for the redevelopment project. It described the area with a legal description. (LF 646) It also limited the use of PILOTS and EATS collected from the Costco project to the Costco project. Ordinances 3339 & 3340. (LF 602-665).

By sweeping all 581 acres into its "project," St. Peters swept too broadly under the statute. The "area selected for the redevelopment project" can be coterminous with the "redevelopment area" only if the ordinance properly identifies the area as a project and the redevelopment area is sufficiently focused to assure that PILOTS and EATS will be collected only from the property substantially benefited by the assessment of these TIF revenues.

St. Peters' argument is wrong either way it is expressed. If the entire SPCRA is a single project, the project definition is too broad because it is not limited to "only those parcels real property and improvements thereon substantially benefited by the proposed redevelopment project improvements; …" § 99.820.1, RSMo 1991.[6] (See, Point I). If the entire SPCRA is not a single project, the ordinances fail to identify a redevelopment project and there is no authority to collect either PILOTS or EATS. (Point II).

St. Peters Ordinance Nos. 1961 and 1962 are ultra vires in that they violate § 99.845 because they exceed the grant of authority to St. Peters by the legislature in the TIF Act. St. Charles is entitled to a refund of the PILOTS and EATS collected by St. Peters under Ordinance Nos. 1961 & 1962.

Conclusion

The trial court erred in sustaining the motion for summary judgment in favor of St. Peters and in overruling the Plaintiffs' motion for summary judgment

[6] In 1997, the legislature amended § 99.805(9). Under that amendment, a "redevelopment area" may now include "only those parcels of real property directly and substantially benefited by the proposed redevelopment project." This amendment did not change the law, it is consistent with § 99.820.1, RSMo 1991, and clarified existing law to reinforce the legislature's original intent. Russell v. Employee Retirement System, 4 S.W.3d 554, 557 (Mo. App. W.D. 1999).

on Counts I – III. This Court may correct this error by entering the order the trial court should have entered, Rule 84.14, or remand to the trial court for entry of appropriate orders.

III. The Trial Court Erred in Granting Summary Judgment in Favor of St. Peters and in Failing to Grant Summary Judgment for St. Charles County on Count IV of Plaintiffs' Petition Because § 99.805(7) Permits the Use of PILOTS for Private Use Only in that the Rec-Plex is a Public Use, Not a Private Use and Provides No Benefit to Private Property.

Standard of Review

As previously expressed, review of the trial court's decision is *de novo*. ITT Commercial Finance Corp v. Mid-America Marine Supply Corp., 854 S.W.2d 871, 876 (Mo. banc 1993).

Argument

The Court's responsibility is "to ascertain the intent of the legislature from the language used and to consider the words used in their plain and ordinary meaning." State v. Rousseau, 34 S.W.3d 254, 259 (Mo.App. W.D. 2000). The legislature is presumed to have intended what the statute says. Id. Therefore, "[c]ourts must give effect to a statute as written." Boone County v. County Employees' Ret. Fund, 26 S.W.3d 257, 264 (Mo.App. W.D.2000). And "[e]very word, clause, sentence and section of an act must be given some meaning." Laclede Cab Co. v. Mo. Comm'n on Human Rights, 748 S.W.2d 390, 399 (Mo. App. E.D. 1988).

The legislature expressly declared that PILOTS "are to be used for a private use." § 99.805(7), RSMo 1991. This limitation is consistent with the character of PILOTS as special assessments and the purpose of TIF financing: to remove economic and infrastructure impediments to private development of land. See, Section 99.810.1(1) RSMo. 2000 (the area "has not been subject to growth and development through investment by ***private enterprise*** and would not reasonably be anticipated to be developed [by private enterprise] without the adoption of tax increment financing")(emphasis added). Count IV of Plaintiffs' petition asserts that St. Peters violated the TIF Act and improperly collected PILOTS to finance the Rec-Plex, a purely public use.

TIF financing rests on the economic foundation "that redeveloped property will pay more taxes than blighted property which remains undeveloped." These additional taxes on improvements captured as PILOTS, which are collected only from property within a redevelopment project and which are deposited in a "special allocation fund," § 99. 845.1(2), are "to be used by the municipalities creating the tax increment financing district and the private developer which will pay the taxes." R. KING, *The Continuing Battle to Curb Urban Blight and the Use of Economic Activity Taxes*, 51 J. MO. BAR 332, 333.

The Rec-Plex pays no taxes and thus pays no PILOTS. Assuming for argument's sake alone that the Rec-Plex is a properly designated project under Ordinances 1961 and 1962 (which it is not), the only way for St. Peters to finance the Rec-Plex under the TIF Act was to use PILOTS and EATS collected from non-

improved property. This is because the Rec-Plex pays no PILOTS, generates virtually no EATS, and pays no ad valorem taxes.

The legislature expressly limited the use of PILOTS to private purposes because projects that are purely public, the Rec-Plex here, cannot support development through tax increment financing since they generate no taxes and no PILOTS.

The trial court concluded "private use" cannot mean "private use" because redevelopment costs include "the costs of construction of public works or improvements." § 99.805(7), RSMo 1991. Plaintiffs do not dispute that public works and improvements – such things as streets and utilities – may be funded with PILOTS. See, Section 599.825.2 RSMo 2000 (public improvements include "highways, roads, streets, bridges, traffic control systems and devices, water distribution systems, curbing, sidewalks, and other public improvements). Such improvements are for the direct and substantial benefit of the private property they serve. They directly and substantially enhance the value of the property from which special assessments are collected. PILOTS, which are special assessments, can only be collected from such properties because their value is enhanced. Thus, such improvements are for a "private use" because they enhance the value of the private property they improve in a manner sufficient to support a special assessment. That is the meaning of Dunn -- that the use of public money to remove blight, though it is for a private use or benefit, also has a public purpose

(not use) sufficient to satisfy the constitution when PILOTS are narrowly collected from improved properties.

The trial court also reasoned that § 99.820.1(9) permits a city to "acquire and construct public facilities within a redevelopment area" and that this provision permits St. Peters to build the Rec-Plex using PILOTS as financing. The trial court confused the issue. The correct issue is not whether a city is authorized to build a public facility within a redevelopment area; it clearly may. The correct issue is whether PILOTS may be used to construct a public facility within a redevelopment area.

The TIF Act draws careful lines as to the uses to which PILOTS and EATS may be put. Those are limited to two uses. First, § 99.845.1 permits PILOTS to be used to pay "redevelopment project costs." Second, § 99.840.2 permits the use of PILOTS and EATS to retire obligations that are pledged "to pay for redevelopment project costs." The TIF Act permits no other uses of PILOTS and EATS. The trial court's attempt to expand the use of PILOTS to public uses, because PILOTS may fund general obligation bonds, misreads the statute.

Section 99.805(11)(f) RSMo. 2000 defines "redevelopment project costs" to include "[c]osts of construction of public works or improvements." § 99.805(11). That subsection does not permit a city to build a Rec-Plex using PILOTS. Therefore, "public works" must be interpreted narrowly to mean only those public projects that provide a direct and substantial benefit to private land that pays the special assessment. PILOTS and EATS can only be collected from

"the area selected for a redevelopment project," and because PILOTS are special assessments, any statutorily authorized expenditure of PILOTS must provide a direct and substantial benefit to the property that pays the PILOTS (or EATS). See Point I, supra.

Moreover, Section 99.825.2 RSMo. 2000 defines a class of projects that qualify as public improvements. They are "infrastructure projects" such as streets and sidewalks, not city recreational buildings.

This interpretation is consistent with the clear, express limitation placed on the use of PILOTS in § 99.805(7) that PILOTS "are to be used for a private purpose…."

This also explains the careful choice of words found in § 99.820.1(6). There, a municipality is authorized to "acquire and construct public facilities within a redevelopment area." (Emphasis added). This is authority to do an act; it is not authority to collect or expend PILOTS.

The Rec-Plex is not a public improvement, See § 99.825.2; it is a "facility." It is "something that is built … to serve a special purpose." NEW COLLEGE MERRIAM-WEBSTER ENGLISH DICTIONARY 416 (1998). It adds no substantial or direct benefit to private property. For this reason, expenditures by a city to "acquire and construct public facilities within a redevelopment area" are not included within the statutory definition of "redevelopment project costs." Absent express authority to expend PILOTS for that purpose, the grant of authority to St. Peters simply permits the city to build a facility with non-TIF funds.

The legislature carefully defined PILOTS. It also carefully limited the uses to which PILOTS could be put. St. Peters can do no more than the legislature permitted it to do. State ex rel. St. Louis Housing Authority v. Gaertner, 695 S.W.2d 460, 462 (Mo. banc 1985) (the powers of public subdivisions are limited to those expressed or implied by statute, and any doubt is construed against the grant of power). The legislature limited the use of PILOTS to a "private use," that is, a use from which a direct and substantial private benefit flows. PILOTS may not be used to construct a purely public facility, which does not enhance the value of private property that pays the PILOTS.

Contrary to the trial court's conclusion that Plaintiffs' interpretation of § 99.805(7) denies St. Peters the ability to build public works and improvements, Plaintiffs' understanding of § 99.805(11) actually authorizes a city to build infrastructure that directly and substantially benefits private property. Absent such express authority in § 99.845.1 for a city to expend PILOTS for "redevelopment project costs" that include public works and improvements, the TIF Act could be read to limit construction with PILOTS to private projects only.

What the TIF Act does not allow, however, is the use of PILOTS to construct a public facility on public land that does not have a substantial and direct private use.

The City of St. Peters violated the TIF Act in employing PILOTS for purely public purposes – the construction of the Rec-Plex.

Conclusion

The trial court erred in sustaining the motion for summary judgment in favor of St. Peters and in overruling the Plaintiffs' motion for summary judgment. This Court may correct this error by entering the order the trial court should have entered, Rule 84.14, or remand to the trial court for entry of appropriate orders.

IV. The Trial Court Erred in Failing to Grant Summary Judgment in Favor of Plaintiffs and Further Erred in Granting Summary Judgment in Favor of the City of St. Peters on Count VI of Plaintiffs' Petition Because the St. Peters Board of Alderman (A) Acted in Bad Faith; (B) Acted Arbitrarily or (C) in Excess of its Authority in Creating the SPCRA TIF District in that the SPCRA TIF District Does not Contain a Predominance of Land that is Blighted.

Standard of Review

As previously expressed, review of the trial court's decision is *de novo*. ITT Commercial Finance Corp v. Mid-America Marine Supply Corp., 854 S.W.2d 871, 876 (Mo. banc 1993).

Argument

Plaintiffs' Count V charges that the St. Peters Board of Aldermen acted (A) in bad faith and/or (B) arbitrarily in creating the St. Peters Centre Redevelopment Area Tax Increment Financing District ("SPCRA"). This Court may set aside a legislative determination if it appears that the legislative determination was arbitrary or made in bad faith. Annbar Associates v. West Side Development Corp., 397 S.W.2d 635, 650 (Mo. banc 1966). "Judicial review is limited to deciding whether the legislative determination was 1) arbitrary, 2) induced by fraud, collusion or bad faith, or 3) was in excess of the

city's powers." City of Springfield v. Bradley, 744 S.W.2d 559, 560 (Mo. App. 1988). (Points I & III argue that St. Peters' acts were in excess of the city's powers.) As the courts express this test in the disjunctive, if any one of these claims is true, this Court must rule in Plaintiffs' favor. Further, "there is a point beyond which a legislative body may not go, even though its actions are presumed correct … . [T]he presumption of validity [of a legislative act] … is not conclusive." Sears v. City of Columbia, 660 S.W.2d 238, 257 (Mo. App. 1983).

As far as Plaintiffs are aware, every other appellate case considering whether a city acted in bad faith or arbitrarily in creating a tax-advantaged district presented a facial challenge to the adoption of such a district, that is, a challenge based on the propriety of the governing body's decision *before* a city took steps to implement the district. This case is different.

Plaintiffs' bad faith claim arises from the actual use to which the City of St. Peters put the millions of dollars it diverted from other taxing authorities including the Fort Zumwalt School District and St. Charles County. Said another way, this case is not about what St. Peters said it would do; this case is about what St. Peters actually did – actions that reveal the bad faith with which St. Peters acted in adopting and implementing the SPCRA.

As the legal basis for its creation of the SPCRA, the St. Peters Board of Aldermen made a legislative determination that blight predominated in the SPCRA. Ordinance 1962 (LF 176). Blight exists, by statutory definition, when

> the **predominance** of defective or inadequate street layout, unsanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire and other causes, or any combination of such factors, retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use; ….

§ 99.805(1)(emphasis added). Where a city has declared an area blighted, as St. Peters did when it created the SPCRA, a "redevelopment plan" has a single objective under the TIF Act – reduction or elimination of those conditions, "the existence of which qualified the redevelopment area as a blighted area…." § 99.805(8). A "redevelopment project" must further the objectives of the redevelopment plan – that is, removal of the conditions cited by the City as causing blight. § 99.805(10). As will be shown, ***St. Peters spent $0 reducing or eliminating the conditions of blight*** in the SPCRA. All of the PILOTS and EATS collected until the creation of the Sub-Area B TIF District – the Costco Project – went to support the construction of the Rec-Plex, not reduce blight. Given this fact, it is clear that St. Peters shaped the SPCRA to maximize its collection of EATS and PILOTS to fund the Rec-Plex – not eliminate blight – and not to conform to the law.

The Findings of Blight

St. Peters identified the following conditions of blight in approving the SPCRA through Ordinance 1961. The description of the blight must be read against the realization that 581 acres were collected into the SPCRA. Against that substantial amount of land, the blighted conditions read like specially-picked nits.

(1) "The Special District portion of the Redevelopment Area is nearly devoid of significant infrastructure to support the potential development sites which are available." (LF 193)

(2) "[The] lack of infrastructure includes roads, water lines, and storm and sanitary sewer lines." (LF 193)

(3) There exist "storm drainage and flooding problems in this area." (LF 193)

(4) The design of the intersection of the South Outer Road and Suemandy Drive "creates a serious traffic hazard which is evidenced by the number of accidents which occur at this location." (LF 195)

(5) "The design of this intersection [the intersection of Suemandy and the South Outer Road] and the adjacent roadways represents a major example of defective street layout and represents a situation which endangers the lives and property of the individuals who use these roadways." (LF 195)

(6) The situation at the intersection of Suemandy and the South Outer Road "represents not only evidence of defective street

layout, conditions which endanger life and property, but also represents an unsafe condition," (LF 195)

(7) The "section of South Outer Road east of Suemandy is in deteriorated condition." (LF 195)

(8) "The pavement surface [on the South Outer Road] has numerous cracks (some of which have been filled) and other pavement irregularities which have begun to make the driving surface rough." (LF 195)

(9) "The Special District comprises approximately 460 acres and constitutes the majority of the land area within the Redevelopment Area. Yet it is served by only three roadways. Two of these are at the perimeter of the area." (LF 195)

(10) "Nearly three-fourths of the land area in the Special District and more than half of the Redevelopment Area is not served by public roads in the form of an internal network." (LF 195)

(11) "[M]ost of the major sectors of the Special District are not served by roads of any kind". (LF 195)

(12) "The inadequacy of the road system serving the Redevelopment Area and particularly the Special District section has severely retarded the growth and development of the area." (LF 196)

(13) "There are a number of instances within the Redevelopment Area that represent the deterioration of site

improvements on various parcels." (LF 197)

(14) "One such instance [of deterioration of site improvements] is the remaining shell of a single-family residence which was destroyed by afire.... This house is not habitable and probably not repairable. It has been condemned by the City in an attempt to effect its removal." (LF 197)

(15) Further as to deterioration of site improvements, on another site, there is identified a vacant building, another building "showing signs of significant deterioration," an unpaved parking lot showing signs of potholes and washout, a "lean to" type of structure which is deteriorating, showing signs of rust and discoloration with bent and dented sections. (LF 198)

(16) Further as to deterioration of site improvements, "the unpaved parking of this site is an example of a site improvement which is below minimum code standards."(LF 197)

(17) Further as to deterioration of site improvements, the Skelgas bulk propane terminal has an unpaved drive and parking lot, in "very poor condition," with major ruts and potholes. (LF 198)

(18) Further as to deterioration of site improvements, the drainage structure located on the north and west sides of Suemandy is a 35-foot wide, 10 to 12 foot high structure, including deteriorated concrete, with vegetation growing through the floor of the structure

to such an extent as "to afford a significant potential to impede the flow of water," decreasing the capacity of the structure and creating a potential for increased 'floodway area in this area and upstream". (LF 198)

(19) The drainage structure is "extremely tempting for children from nearby subdivisions to play in and around" ... and therefore "***represents a condition which is a potential danger to life and property and is a potential menace to public safety***." (LF 198).

(20) Further as to deterioration of site improvements, a 24-inch sanitary sewer line extends through the Redevelopment Area, constructed approximately 20 years ago of fiberglass. (LF 199)

(21) Further as to deterioration of site improvements, "[s]ite fill materials such as soil and other material such as broken concrete, asphalt, bricks and masonry block have been placed on various parcels along the alignment of this [24-inch] sanitary sewer line." (LF 199)

(22) Further as to deterioration of site improvements, no granular backfill was used in installing the 24-inch sanitary line. (LF 199)

(23) Further as to deterioration of site improvements, the 24-inch sanitary line has collapsed on at least two occasions. (LF 199)

(24) The situation with the 24-inch sanitary sewer line "represents deterioration of a site improvement and the presence of an unsanitary condition, as well as a potential menace to public health." (LF 199).

(25) "There are many instances of property platting in the Redevelopment Area which represent obsolete parcel configurations for the construction of modem retail and office commercial uses and institutional uses." (LF 199).

(26) 12 to 14 parcels in the northwest sector of the Redevelopment Area have "oddly shaped configurations, quite often consisting of narrow frontages to existing roadways with parcels that fan out to large areas which are "behind" other parcels." (p. 13). Some of these parcels "have been configured so that the depth to width relationship makes development difficult in terms of meeting codes and/or using the parcel to is [sic] fullest extent allowable under current codes." (LF 199)

(27) "Some of this platting creates parcels which are landlocked." (LF 199).

(28) Another instance of obsolete platting "exists in a group of parcels which are in and around the intersection of Spencer and Mexico Roads" which also represent oddly shaped configurations, narrow frontages compared to depths of parcels and landlocked

parcels. (LF 199).

(29) The Duello tract's presence (an island of land outside the City limits) and "L" shape "constitute[s] obsolete platting," and "complicate[s] any subsequent resubdivision of the area in some more usable/building configuration." (LF 199)

(30) Other parcels "which share many of the same characteristics of obsolete platting as those discussed above" are located at the eastern end of the Redevelopment Area. (LF 200)

(31) "The land west of the Williams pipeline parcel is subdivided into a number of long and narrow parcels." (LF 200)

(32) "Other parcels to the south of [the Williams pipeline parcel] are landlocked without access to the road network." (LF 200).

(33) Conditions exist which are below current zoning, signage and building codes, such as the building and site improvements at Pool King (unpaved parking areas, lack of landscaping, fencing type, and architecture), the State Farm Building (unpaved parking lot, lack of proper landscaping, and architectural features), six billboards located with the district and along the South Outer Road (method of construction is not as required, and minimum spacing not met). (LF 200-201)

(34) Excessive vacancies exist in the Redevelopment Area,

including, the over two-year vacancy of a converted house next to the Hamilton Square Development, which has been historically used as a real estate office, a long strip commercial-type building with a history of high tenant turnover and vacancy, and a Hamilton Square building which exhibits "a vacancy rate of about 33% virtually since it was built." (LF 201-202)

(35) Inadequate utilities, including the fact that "only the perimeter of the Redevelopment Area is served by all utilities (water, storm and sanitary sewers, natural gas, electricity, and telephone)" requiring for development the construction of"[w]aterline extensions along the Spencer Road Extension ..., and relocation of an existing line," construction of "[s]anitary sewer lines within the Special District and relocation of an existing line," and "[m]ore than two-thirds of a mile (3600 feet) of major storm water channel improvements of varying magnitude primarily in the western portion of the Redevelopment Area." (LF 202)

(36) "[D]uring periods of heavy rain there is flooding in the redevelopment Area particularly at the eastern edge of the Mall area…." (LF 202)

(37) "There is a significant floodway and 100-Year Floodplain area through much of the western third of the Redevelopment Area." (LF 202)

(38) As a result of the "the deficiency of the [stormwater] system under the highway, there is often flooding of the highway during periods of heavy rain. Three times during the last 10 years flooding has resulted in closure of 1-70. Of course, this also causes flooding and property damage along the downstream parts of the system in the Redevelopment Area." (LF 203)

(39) "Flooding also occurs to the west and the south on the Manning property." (LF 203).

(40) "Except for the land uses around the periphery of the Redevelopment Area, the "core" of the Redevelopment Area (which is the Special District) is vacant..., today much of it is not being used at all. This vacant land area comprises about half of the total acreage within the Redevelopment Area boundaries." (LF 205).

A. The St. Peters Board of Alderman Acted in Bad Faith in Creating the SPCRA

"[A] thing is done in 'bad faith' when it is in fact done dishonestly and not merely negligently." General Insurance Co. of America v. Commerce Bank of St. Charles, 505 S.W.2d 454, 457 (Mo. App. 1974). "Evil motive is not the gauge" of bad faith. Id. at 458. A claim of bad faith is measured by what the Board of Aldermen actually did – that is, whether the Board of Aldermen's stated rationale for its declaration proved to be the actual purpose for its legislative act when the act was carried out. Thus, a facially legitimate legislative act may be passed citing

all the proper words and using all the proper procedure, but may have been passed in bad faith when the evidence shows that the legislative body did not do what its act and the law bound it to do.

The evidence supporting Plaintiffs' bad faith claim is not disputed. The Board of Aldermen adopted an ordinance that required it to eliminate or reduce conditions of blight. The Redevelopment Plan listed the conditions that led to the Board of Aldermen's determination of blight and indicated that the TIF would provide immediate relief. St. Peters spent $0 reducing or eliminating the conditions of blight that formed the legal justification for the creation of the SPCRA.

The evidence of the City's bad faith follows:

(1) All of the PILOTS and EATS collected from the creation of the SPCRA until the approval of the Costco project were spent to construct, maintain or operate the Rec-Plex. From 1993 until its last filed report with the State of Missouri, all of the TIF Funds collected by the SPCRA were employed by St. Peters to finance the REC-PLEX. (LF 313)

(2) On May 21, 1992, more than six months prior to adopting the SPCRA which cited Spencer Road as a justification for a finding of blight, St. Peters entered into a contract with St. Charles County under which the Spencer Road extension would be financed with St.

Charles County Transportation Sales Tax revenues. Ordinance 94-31 (LF 1568).

(3) St. Peters did not adopt ordinances approving the SPCRA until December 29, 1992. (LF 169)

(4) "*[The REC-PLEX] project will consist of development of a new recreation center … at the eastern end of the 62-acre tract currently occupied by City Hall and other recreation facilities."* (LF 212) Development had already occurred in the 62 acre area in which the City intended to build the Rec-Plex. "*The City made the initial commitment to the concept of the Special District by constructing a new City Hall surrounded by extensive parks and recreation facilities on a site of more than 62 acres."* (LF 6)

(5) The City of St. Peters expended no PILOTS and no EATS for eradication of the blighting factors set out in the Redevelopment Plan, including blight that (supposedly) threatened the health and safety of St. Peters' residents by the City of St. Peters. (LF 1566, 1570, 1571).

(6) The J.C. Penney addition to the Mid Rivers Mall was already proposed at the time of the adoption of the SPCRA. (LF 1557)

(7) The list of project costs set out in the Redevelopment Plan provided no money for removing many of the blight features identified in the Ordinances and Redevelopment Plan. See LF 562 (Table 4).

The evidence is that St. Peters created this 581 acre TIF district and began collecting TIF revenues, without approving a single private redevelopment project, for the primary purpose of capturing revenues from areas that included existing businesses and soon-to-be constructed businesses. In so doing, St. Peters took revenue from the school district and its students and teachers and from the transportation, general revenue and capital improvements needs of St. Charles County and her citizens.

Further, St. Peters failed to eradicate or take steps to eliminate the conditions of blight or contributing factors to its finding of blight after the SPCRA was approved and TIF revenues were collected. Prior to the adoption of the SPCRA, St. Peters had already made arrangements with St. Charles County for the construction of the Spencer Road extension with non-TIF funds. Nevertheless, and knowing that it had already completed arrangements to construct the Spencer Road extension with non-TIF revenues, the St. Peters Board of Aldermen included the Spencer Road extension as a major project and contributing factor to blight, finding that the Spencer Road extension could not be funded without TIF revenues generated by the SPCRA. (LF 1568).

The evidence supporting Plaintiffs' bad faith claim is not disputed. The Board of Aldermen adopted an ordinance that required it to eliminate or reduce conditions of blight. The Redevelopment Plan listed the conditions that led to the Board of Aldermen's determination of blight and indicated that the TIF would

provide immediate relief. St. Peters failed to expend PILOTS and EATS to eliminate its "blight."

(B) The Action of the St. Peters Board of Aldermen in Creating the SPCRA was Arbitrary

A challenge to a legislative act based on a claim that the legislative body acted arbitrarily is a challenge to the facial validity of the legislative act. "The idea of 'arbitrariness' focuses on whether a rational basis for the trial court's decision exists." D.L. Dev., Inc. v. Nance, 894 S.W.2d 258, 259 (Mo. App. W.D. 1995). A decision is arbitrary if it lacks substantial evidence to support it. Missouri National Education Ass'n v. Missouri State Board of Education, 34 S.W.3d 266, 267 (Mo. App. W.D. 2000). Courts may set aside the decision of a legislative body if the decision of that body is not fairly debatable or is reasonably doubtful. Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp., 518 S.W.2d 11, 16 (Mo. 1974).

Section 99.805(1) RSMo. 2000 requires the city to find that blight predominates. "Predominance" is the important word in the section. It is not enough for there to be some blight; it must predominate, that is, it must be "1. the stronger or leading element or force. 2. to have numerical superiority or advantage." THE NEW WEBSTER'S ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE 524 (1997). Thus, the decision of the Board of Aldermen to declare the entire area of the SPCRA blighted was arbitrary if the evidence shows that blight did not predominate the redevelopment area.

The cases that have considered the question have noted that vacant or undeveloped land is not blighted because it is undeveloped or vacant, but may be included in a blighted area. "To insure effective redevelopment of such an area, it probably would be necessary in certain instances to acquire buildings or vacant land which, but for being in the area, would not be blighted…." State ex inf. Dalton v. Land Clearance for Redevelopment Authority of Kansas City, 270 S.W.2d 44, 53 (Mo. banc 1954) "[V]acant land and land that is to be used for parking lots may be included in an area that is to be declared blighted…." Parking Systems, Inc. v. Kansas City Downtown Redevelopment Corp., 518 S.W.2d 11, 16 (Mo. 1975); Schweig v. City of St. Louis, 569 S.W.2d 215, 227 (Mo. App. 1978).

Further, this Court has suggested that "predominate" means more than half of the property is blighted.

> Even if we assume that an area may not be said to demonstrate a "predominance" of blight unless more than half of the ground area is blighted, the owners' argument is not sound. Streets and alleys exist to serve the adjoining properties, and partake of the character of these properties. Surface parking constitutes a two-dimensional use which inhibits other, more economically intense, uses. Streets and parking lots consume valuable urban land. The legislative authority may properly find that they contribute to a condition of blight.

Tierney v. Planned Industrial Expansion Authority of Kansas City, 742 S.W.2d 146, 151 (Mo. banc 1987)(emphasis added). See also State ex rel. United States

Steel v. Koehr, 811 S.W.2d 385, 390 (Mo. banc 1991)("about half the property was vacant").

If one considers the areas of blight outlined in the Redevelopment Plan (LF 242), one quickly discovers that the indicia of blight identified by the Redevelopment Plan is substantially less than one-half of the land. Even if one assumes that the sewer line correction affects a large portion of the land within the SPCRA, no projects were identified for that area under the redevelopment plan and that land remains undeveloped, i.e. not blighted.

The evidence does not support the Board of Aldermen's conclusion that blight predominates in the SPCRA.

Given that the material facts are not in dispute, this Court should, respectfully, conclude as a matter of law that the decision of the Board of Aldermen to approve the SPCRA was made in bad faith, violated the TIF Act and was arbitrary in that it lacked substantial justification in known facts.

Conclusion

The trial court erred in sustaining the motion for summary judgment in favor of St. Peters and in overruling the Plaintiffs' motion for summary judgment. This Court may correct this error by entering the order the trial court should have entered, Rule 84.14, or remand to the trial court for entry of appropriate orders.

V. The Trial Court Erred in Failing to Grant Summary Judgment in Favor of Plaintiffs and Further Erred in Granting Summary Judgment in Favor of the City of St. Peters on Count VI of Plaintiffs' Petition Because the St. Peters Board of Alderman Violated Article VI, § 27(b) by Issuing Revenue Bonds Without a Vote of the People for the Costco Project in that the Bonds Issued Will not be Retired Using Lease Proceeds and there is No Constitutional Authority in the City of St. Peters to Issue Revenue Bonds Outside Article VI, §§ 27, 27(a) or 27(b).

Standard of Review

As this is an as applied challenge to the TIF Act, the Court's consideration focuses on and is limited to whether the application of the TIF Act made by St. Peters comports with the constitution. Review of the trial court's decision is *de novo*. ITT Commercial Finance Corp v. Mid-America Marine Supply Corp., 854 S.W.2d 871, 876 (Mo. banc 1993).

Argument

Plaintiffs' Count VI charged that the St. Peters Board of Aldermen issued revenue bonds payable from EATS and PILOTS in violation of MO. CONST. Article VI, § 27(b).

Article VI, Section 27(b) of the Missouri Constitution provides:

> Any … city … in this state, by a majority vote of the governing body thereof, may issue and sell its negotiable interest bearing revenue bonds for the purpose of paying all or part of the cost of purchasing, constructing, extending or improving any facility to be leased or otherwise disposed of pursuant to law to private persons or corporations for … commercial … purposes, including the real estate, buildings, fixtures and machinery. ***The cost of operation and maintenance and the principal and interest of the bonds shall be payable solely from the revenues derived by the … city … from the lease or other disposal of the facility.***

(Emphasis added).

This is a case of first impression. Plaintiffs are aware of no case that has considered whether the TIF Act permits a city to issue revenue bonds that do not provide for industrial or airport uses (Art. VI, § 27); utilities and airports (Art. VI, §27(a); or industrial development, commercial, manufacturing or warehousing payable with lease or disposal of the property revenue(Art. VI, § 27(b)). Section 27(b) is the only provision that could grant St. Peters authority to issue revenue bonds in this case. Further, had St. Peters' approved bonds to purchase a commercial property and lease the property to Costco, there would be no § 27(b) claim here.

The trial court found that St. Peters could issue its revenue bonds because the revenue bonds were not issued to purchase, construct, extend or improve a commercial facility. The trial court concluded that § 27(b) did not apply. The

trial court missed the point. The point is that St. Peters issued bonds that did not meet the requirements of the authority granted in § 27(b).

The trial court relied on Tax Increment Financing Commission of Kansas City v. J.E. Dunn, 781 S.W.2d 70 (Mo. banc 1989) to conclude that the revenue bonds in this case were constitutional. This was a misreading of Dunn.

Among the many issues it decided, Dunn considered a challenge to the TIF Act based on Article VI, § 27, ***not*** § 27(b). Specifically, Dunn considered whether bonds issued under the TIF Act required voter approval. The entire discussion of the issue in Dunn follows:

> Finally, Dunn argues that Mo. Const. art. VI, § 27 requires voter approval prior to the issuance and sale of revenue bonds. Absent voter approval, Dunn continues, the Commission may not acquire Dunn's property with the proceeds of the "unlawful" bonds.
>
> On the same day the voters approved art. VI, § 27, they also approved Mo. Const. art. VI, §§ 27(a) & (b). In a quo warranto action designed to determine which if any of the amendments became part of the Constitution, this Court held that the amendments were not irreconcilably in conflict and that both became part of the Constitution. State ex inf. Ashcroft v. City of Fulton, 642 S.W.2d 617 (Mo. banc 1982).
>
> The constitutional provision upon which Dunn relies grants political subdivisions authority to issue revenue bonds upon voter

> approval for three purposes: utility plants, manufacturing plants and industrial development purposes, and airports. Art. VI, § 27(b), however, permits "[a]ny ... city ... by a majority vote of the governing body thereof ..." to issue and sell revenue bonds to pay, inter alia, the costs of acquiring real estate for commercial and warehouse purposes. Art. VI, § 27 does not apply in this case; because the Plan contemplates the commercial and warehouse development, art. VI, § 27(b) controls and the City may issue its bonds lawfully upon approval of its governing body. The record shows that the City Council of Kansas City approved the issuance and sale of these bonds. Dunn's final point is without merit.

Id. at 79-80.

As Dunn shows, Kansas City followed § 27(b). This Court decided only that where a city met the requirements of § 27(b), it could issue revenue bonds without a vote of the people. Whether a city may issue revenue bonds under § 27(b) payable from non-lease revenue was not before the Court in Dunn.

The trial court found that Dunn controls. That conclusion is incorrect. The § 27(b) challenge Plaintiffs bring focuses on the absence of legal authority in the St. Peters' Board of Aldermen to approve revenue bonds funded in whole or in part from non-lease revenue.

In deciding this issue, the Court must rely on the plain language of the Constitution, specifically § 27(b). "The law is well settled that it is the duty of the

court, in construing the constitution, to give effect to an express provision rather than an implication." Rathjen v. Reorganized School Dist. R-II of Shelby County, 284 S.W.2d 516, 527 (Mo. 1955). "Where no exceptions are made in terms, none will be made by implication or construction." Id.

First, § 27(b) provides that revenue bonds issued by a city without voter approval "shall be payable solely from the revenues derived by the … city … from the lease or other disposal of the facility."

Second, the voters did not approve the issuance of any bonds in connection with the Costco project.

Third, as St. Peters admits "'TIF Revenues' are the sole source of funds for payment of the obligations supporting the Costco redevelopment…." (LF 370).

Fourth, St. Peters admits that the Costco project is a commercial project. (LF 370).

Fifth, TIF Revenues, i.e. PILOTS and EATS, are not revenues derived from a lease.

Sixth, where the constitution speaks to an issue, the legislature may not authorize an action that is contrary to that constitutional limitation. Kansas City v. Fishman, 241 S.W.2d 377, 379 (Mo. 1951).

To the extent that the TIF Act permits St. Peters to issue revenue bonds without a vote of the people for commercial purposes, the principle and interest on such bonds must be retired "solely" with revenue from the lease. St. Peters bonds do not meet this core, constitutional criteria.

For these reasons, the TIF obligations of the City of St. Peters violate Article VI, § 27(b). St. Peters had no constitutional authority to issue revenue bonds for the Costco project unless those bonds were to be "payable solely from the revenues derived … from the lease or other disposal of the facility."

Conclusion

The trial court erred in sustaining the motion for summary judgment in favor of St. Peters and in overruling the Plaintiffs' motion for summary judgment. This Court may correct this error by entering the order the trial court should have entered, Rule 84.14, or remand to the trial court for entry of appropriate orders.

VI. The Trial Court Erred in Failing to Grant Summary Judgment in Favor of Plaintiffs and Further Erred in Granting Summary Judgment in Favor of the City of St. Peters on Count VIII of Plaintiffs' Petition Because § 99.845 violates Article VI, §§ 23 and 25 of the Constitution in that § 99.845 permits St. Peters to Use Public Money to assist Costco.

Standard of Review

Review of the trial court's decision is *de novo*. ITT Commercial Finance Corp v. Mid-America Marine Supply Corp., 854 S.W.2d 871, 876 (Mo. banc 1993). Statutes are afforded a presumption of constitutionality. Blaske v. Smith & Enteroth, Inc., 821 S.W.2d 822, 828 (Mo. banc 1991).

Argument

Article VI, § 23 MO. CONST. prohibits certain acts by political subdivisions of the state. "No … city … shall … grant public money in aid of any corporation…." (Emphasis added.) Article VI, § 25 MO. CONST. expressly forbids "grants of public money … to any private … corporation, … except as provided in this constitution." (Emphasis added.)

The cited constitutional prohibitions invoked by Plaintiffs in Count VIII are clear and unambiguous. From the language of these constitutional prohibitions, any aid to private corporations is forbidden unless there is an express

constitutional permission to give such aid. But for the existence of express constitutional exceptions to these prohibitions, many of the development schemes using ad valorem taxes that have received approval by the courts in the cases cited by St. Peters should not have withstood constitutional challenges.

Count VIII involves EATS, not PILOTS, and because the legal character of EATS (as sales taxes, *not* ad valorem special assessments) is different than the legal character of PILOTS, the application of the constitutional provisions at issue in this case is a matter of first impression, neither addressed nor controlled by decisions of the Supreme Court relating to ad valorem taxes.

The distinction between sales taxes (EATS) and abatements of ad valorem taxes on real property (PILOTS) is of substantive legal significance. The decision of the Supreme Court of Missouri in Tax Increment Financing Commission of Kansas City v. J.E. Dunn Construction Co, 781 S.W.2d 70 (Mo. banc 1989) applies only to a facial attack on the constitutionality of payments in lieu of taxes ("PILOTS"). Dunn holds that PILOTS are not taxes, but are abatements of ad valorem taxes characterized as special assessments. Dunn, 781 S.W.2d at 77.

EATS did not exist as a financing option at the time the Court decided Dunn nor were EATS or any sales taxes collected by one governmental entity for unfettered use by another governmental entity considered by the Court in reaching its decision in that case. For these reasons, Dunn does not address the constitutional questions Plaintiffs raise concerning the application of the TIF Act in this case.

The relevant constitutional exceptions are found in art. X, § 7 and in art. VI, § 25 itself. For ease of comparison, the relevant constitutional provisions are laid out side-by-side.

Relevant Constitutional Provisions.

General Constitutional Prohibition	**Express Constitutional Exception to General Prohibition**
Article VI, § 23	For the purpose of the encouraging forestry when lands are devoted exclusively to such purpose, and the reconstruction, redevelopment, and rehabilitation of obsolete, decadent, or blighted areas, the general assembly by general law may provide for such partial relief from *taxation of the lands* devoted to any such purpose, and of the improvements thereon, by such method or methods, for such period or periods of time, not exceeding twenty-five years in any instance, and upon such terms, conditions, and restrictions as it may prescribe; provided, however, that in the case
No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this constitution.	

(emphasis added).

of forest lands, the limitation of twenty-five years herein described shall not apply. (Article X, § 7)(emphasis added).

Article VI, § 25

No county, city or other political corporation or subdivision of the state shall be authorized to lend its credit or grant public money or property to any private individual, association or corporation except as provided by Article VI, Section 23(a)[7] and except that… [continues in column across]

…the general assembly may authorize any county, city, or other political corporation or subdivision to provide for the retirement or pensioning of its officers and employees and the surviving spouses and children of deceased officers and employees and may also authorize payments from any public funds into a fund or funds for paying benefits upon retirement, disability or death to persons employed and paid out of any public fund for educational services and to their beneficiaries or estates; and except, also, that any county of the first class is authorized to provide for the creation and establishment of death benefits, pension and retirement plans for all its salaried employees, and

[7] Article VI, § 23(a) permits political subdivision to issue bonds upon voter approval for industrial plants. This constitutional provision is not at issue in this case.

> the surviving spouses and minor children of such deceased employees; and except also, any county, city or political corporation or subdivision may provide for the payment periodic cost of living increases in pension and retirement benefits paid under this section to its retired officers and employees and spouses of deceased officers and employees, provided such pension and retirement systems will remain actuarially sound. (Article VI, § 25).

To repeat: A fundamental distinction must be made in analyzing this claim: This claim involves economic activities taxes ("EATS"), not PILOTS (payments in lieu of taxes relating to real property). EATS are not abatements of taxes designated as special assessments against real property; they are sales taxes collected in a tax increment financing ("TIF") district. See § 99.805(4).

That EATS are taxes is made clear by the very name the legislature chose – "economic activity taxes"; by language in County of Jefferson v. Quiktrip, 912 S.W.2d 487 (Mo. banc 1995) describing EATS as taxes, and by the leading legal commentator on the subject, see, R. KING, *The Continuing Battle to Curb Blight and the Use of Economic Activity Taxes*, 51 J.MO.BAR 332, 333

(1995)("[e]conomic activity taxes … appear to be taxes from the time they are collected until they are disbursed.")

Dunn makes clear that as to ad valorem taxes, the TIF law is constitutionally justified because express constitutional permission exists for its use of ad valorem taxes. "By its clear terms, the Constitution permits the General Assembly to provide partial tax relief; included within that power is the authority to redirect revenues attributable to improvements *for the purposes enumerated in art. X, § 7*." Dunn, 781 S.W.2d at 76 (emphasis added).

There is no constitutional provision permitting the use of sales tax revenue to assist private corporations or individuals. Where the constitution speaks to an issue, the legislature may not authorize an action that is contrary to that constitutional limitation. Kansas City v. Fishman, 241 S.W.2d 377, 379 (Mo. 1951). Thus, the broad constitutional prohibition applies to EATS. For the reasons discussed, Dunn does not require a different result.

The trial court's reliance on State ex inf. Dalton v. Land Clearance for Redevelopment Authority of Kansas City, 270 S.W.2d 44 (Mo. banc 1954) seems similarly misplaced. Dalton involved a challenge to land clearance statutes that permitted a city to purchase property from a private individual, clear and improve it, and sell it for its then-fair market value to another private entity. Against an Article VI, §§ 23 & 25 challenge that this plan amounted to a grant of public money for a private entity because the city would lose money in this proposition, the Supreme Court held: "It would be difficult to imagine a workable law that

exacted more from a purchaser than a 'fair value' price. An exaction that the purchaser pay fair value cannot conceivably amount to a grant or subsidy." Id. at 53.

There is no sale for fair market value in the TIF Act, St. Peters merely grants sales tax revenues to Costco, a private entity. Dalton is inapposite.

Curiously, the trial court also relied on Berry v. State, 908 S.W.2d 682 (Mo. banc 1995) to decide this issue. Berry addressed the constitutionality of a legislative decision to alter the allocation of county-wide, general purpose sales taxes to all municipalities within a county. Moreover, the language quoted by St. Peters – that "changing the distribution of revenue is not the 'levying' of a new tax requiring voter approval" – is in response to the Berry plaintiffs' Hancock Amendment challenge to the legislation under art. X, § 22. Berry also suggests that "Art. VI, § 23 does not apply to shifts in revenue among public bodies." Id., at 685. This is so, and also completely irrelevant to the issue.

Finally, the trial court analyzed this case as a "grant of public money" case not a "lend its credit" case. Count VIII challenges the use of sales tax money, i.e. public money, to aid a private corporation, not the ability of St. Peters to pledge its general revenues to secure financial obligations. The constitutional provision at issue prohibits direct expenditures as well as pledges of credit. Only the former is involved in this case. Indeed, Plaintiffs concede that St. Peters has not pledged its credit for the SPCRA or the Costco project.

In sum, there is no express constitutional provision permitting a city to grant ***sales*** tax revenue in aid of a private corporation for any purpose. And there is no Missouri appellate decision of which Plaintiffs are aware approving the use of sales tax revenues for that purpose.

This is a case of first impression. The constitution contains specific prohibitions and specific exceptions. The constitutional exceptions define the accepted public purposes that the courts have approved using ad valorem tax revenues. The use of sales tax revenue to aid private entities is not among the exceptions to the specific constitutional prohibitions.

Conclusion

The trial court erred in sustaining the motion for summary judgment in favor of St. Peters and in overruling the Plaintiffs' motion for summary judgment.[8] This Court may correct this error by entering the order the trial court

[8] It is questionable whether economic development of this area by means of private, for profit retailers constitutes a public use. The City of St. Peters clearly felt it was justified under the TIF law in treating the development of the property as a public use: The COSTCO land may have been acquired pursuant to eminent domain proceedings. LF 667.

In a similar factual scenario, the Michigan Supreme Court questioned whether a public benefit arises from the development of a private profit-making

enterprise. In County of Wayne v. Hathcock, 684 N.W.2d 765 (Michigan 2004), the Michigan Supreme Court was presented with a case challenging whether the use of condemnation meets a public use test when the condemnation is for the purpose developing a 1300 acre business and technology park to revitalize a struggling economic area. The Court stated:

> [T]he landscape of our country is flecked with shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce. We do not believe, and plaintiff does not contend, that these constellations required the exercise of eminent domain or any other form of collective public action for their formation. Second, the ... Project is not subject to public oversight to ensure that the property continues to be used for the commonwealth after being sold to private entities. Rather, plaintiff intends for the private entities purchasing defendants' properties to pursue their own financial welfare with the single-mindedness expected of any profit-making enterprise. The public benefit arising from the Pinnacle Project is an epiphenomenon of the eventual property owners' collective attempts at profit maximization. No formal mechanisms exist to ensure that the businesses that would occupy what are now defendants' properties will continue to contribute to the health of the local economy.

should have entered, Rule 84.14, or remand to the trial court for entry of appropriate orders.

Id. at 783-784.

The debate about whether, and when, economic development projects constitute a public use will be taken up by the United States Supreme Court this term in the context of condemnation of property for an economic development project. In Kelo v. City of New London, 843 A.2d 500 (Conn. Mar 09, 2004), the Connecticut Supreme Court held, in part, that economic development projects created and implemented pursuant to Connecticut law that allowed the exercise of eminent domain in furtherance of public economic benefits of creating new jobs, increasing tax and other revenues, and contributing to urban revitalization, satisfied the public use clauses of the state and federal constitutions. The United States Supreme Court has accepted certiorari in the case. Kelo v. City of New London, Conn., *cert. granted*, 125 S.Ct. 27, 73 USLW 3178, 73 USLW 3204 (U.S.Conn. Sep 28, 2004) (NO. 04-108).

VII. The Trial Court Erred in Ruling that the Statute of Limitations Barred Plaintiffs' Action Because the Statute of Limitations does not Bar Plaintiffs Causes of Action in that Plaintiffs Timely Filed their Causes of Action within Five Years of the Time Damages were Sustained and were Capable of Ascertainment and Because the Periodic Demands for Payment by St. Peters Constitutes a Continuing Wrong.

Standard of Review

As previously expressed, review of the trial court's decision is *de novo*. ITT Commercial Finance Corp v. Mid-America Marine Supply Corp., 854 S.W.2d 871, 876 (Mo. banc 1993).

Argument

Under § 516.100, RSMo 2000 a cause of action accrues "not … when the wrong is done," but when damages resulting from the wrongful act "are sustained and capable of ascertainment…." The trial court held that the passage of an ordinance, the wrongful act, triggered the § 516.100, RSMo 2000 statute of limitations and pretermitted consideration of the merits.

The cases of this Court and of the districts of the Court of Appeals are legion holding that the statute of limitations begins to run when the damages are

sustained and capable of ascertainment. By the plain meaning of the statutory language, damages are "sustained" when they actually occur. See, WEBSTER'S ENCYCLOPEDIC DICTIONARY OF THE ENGLISH LANGUAGE 662 (suffer: "to sustain injury, disadvantage or loss…"). Damages are capable of ascertainment when the fact of damage is made known. D'Arcy & Assoc. Inc., v. KPMG Peat Marwick LLP, 129 S.W.3d 25, 29 (Mo. App. W.D. 2004). Thus, damages are sustained and capable of ascertainment when (1) they actually occur and (2) the damages could have become known to the person damaged. The statute is careful to say, moreover, that it is *not* the wrongful act that triggers the accrual of the cause of action, but the actual sustaining of damages.

This statutory standard serves to "ascertain the time when plaintiff could have first maintained the action to a successful suit." Janssen v. Guaranty Land Title Co., 571 S.W.2d 702, 705 (Mo. App. 1978). The statute of limitations "begins to run when the plaintiff's right to sue arises." Lato v. Concord Homes, Inc., 659 S.W.2d 593, 595 (Mo. App. 1983). Damages "are capable of being ascertained when a plaintiff having a recognized theory of recovery sustains compensable damages." Grady v. Amrep, Inc., 139 S.W.2d 135 (Mo. App. E.D. 2004).

This case seeks, among other remedies, a refund of PILOTS and EATS paid by St. Charles County to the City of St. Peters. St. Charles County could not have brought suit to obtain any refund until there was something to refund -- that is, when St. Charles County first made payments in response to St. Peters' first demand for payments of PILOTS and EATS under the TIF Act. This is the time

when damages are "sustained." Thus, the time of the first payment is the time when St. Charles County's "right to sue arises," Lato, 659 S.W.2d at 595, and, as will be explained below, only as to each payment that was due.

St. Charles County's damages were not capable of ascertainment in any measure when St. Peters passed its 1992 ordinances. That was, at most, a wrongful act from which "the cause of action shall *not* be deemed to accrue…." § 516.100 (emphasis added). Yet the Court of Appeals opinion holds that the cause of action accrues when the wrongful act occurs -- that is, the passage of the ordinances. St. Charles County's damages became known only in 1995 and 1997, when St. Charles County paid its first PILOTS and EATS respectively, and the damages were sustained and capable of ascertainment only then, not when the ordinances were first adopted. (Amounts due in subsequent years were not known until the bills were calculated and sent for each of those years.)

The holding of City of Velda City v. Williams, 98 S.W.3d 880 (Mo. App. E.D. 2003) is directly on point, recognizing that it is not the wrongful act (the passage of the ordinance), but the actual payment of money under the ordinances that causes the cause of action to accrue.

In City of Velda, the city passed an ordinance in May, 1995 increasing the compensation of the mayor. The mayor began accepting the increased compensation on June 22, 1996. After the mayor left office, the City brought suit on September 8, 1998 to recover the additional compensation paid the mayor, claiming that the ordinance violated Mo. Const. Art. VII, § 13. The mayor

claimed that the § 516.130, RSMo 1994 three year statute of limitations applied, that the statute of limitations began to run when the ordinance was passed, not when she received the first payment of additional compensation, and that the City's suit was time barred. The Court of Appeals rejected the mayor's argument, holding that it was the mayor's receipt of the money, not the passage of the ordinance, that triggered the running of the statute of limitations

> Here, the cause of action against Williams [the mayor] is based not on the improper enactment of the ordinance, but rather on the illegal taking of the money by Williams. Until such time as Williams misappropriated the money pursuant to the ordinance, there was no cause of action against her. At the time Williams took the money, the damage was sustained and was capable of ascertainment…. *See, e.g., City of St. Joseph v. Wyatt, 274 Mo. 566, 203 S.W. 819 (1918)* (statute of limitations started to run when misappropriation of funds by the city's treasurer could have been discovered). City's cause of action was brought within three years of that date and was not barred by § 516.130. Williams's [statute of limitations argument] is denied.

Id. at 883.

Plaintiffs argue that "the refund issue goes to … [St. Peters'] authority to ***collect*** PILOTS and EATS, not to the ***creation*** of the TIF District." (Slip op. at 7). Nevertheless, the trial court concluded that the statute of limitations began to run when the ordinance was passed – before St. Charles County knew or could have

known that St. Peters intended to collect PILOTS and EATS and before any payments were either demanded by St. Peters or made by St. Charles. To require St. Charles County to file an action for a refund of payments made before the need for payments was known, before the payments were made or before the amount of payments was known is contrary to every appellate decision of this state dealing with the meaning of the statutory phrase "when the damage resulting therefrom is sustained and is capable of ascertainment."

Conclusion

The trial court erred in sustaining St. Peters' Summary Judgment Motion on the grounds that the § 516.100 statute of limitations barred the Plaintiffs causes of action.

VIII. The Trial Court Erred in Ruling that the Statute of Limitations Barred Plaintiffs' Action Because the Statute of Limitations does not Bar Plaintiffs Causes of Action in that Each Year's Demand by St. Peters for PILOTS and EATS is a Continuing Wrong Extending the Statute of Limitations under §516.100 for an Additional Five Years.

Standard of Review

As previously expressed, review of the trial court's decision is *de novo*. ITT Commercial Finance Corp v. Mid-America Marine Supply Corp., 854 S.W.2d 871, 876 (Mo. banc 1993).

Argument

Section 516.100 provides that a cause of action accrues "when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained."

The statutorily mandated tolling of the statute of limitations recognizes that where continuing payments are required the statute of limitations is tolled.

On a promissory note, the statute of limitations begins to run pursuant to § 516.100 only when the last installment of the promissory note is due, not on the

date of execution of the note. Estell v. Estate of Iden, 714 S.W.2d 774, 777 (Mo.App. E.D. 1986), citing Sabine v. Leonard, 322 S.W.2d 831, 837[3] (Mo. banc 1959). Likewise, if payment of installments of premium on a surety bond were made as they fell due, "no question under the statute of limitations could possibly arise, for such payments would toll the statute." American Surety Co. of New York v. Fruin-Bambrick Construction Co., 166 S.W. 333 (Mo. App. 1914). Further, it is long settled that installment payments toll the running of the statute of limitations.

> The statute of limitations does not apply to a running account where there has been a payment within the period of time limited for bringing the action. The account was continuous and there is no merit in the suggestion that it accrued at the end of each month so as to bar all months more than five years prior to the commencement of the action.

Beeler v. Finnel, 85 Mo. App. 438 (1900). See also, Barberi v. University City, 518 S.W.2d 457 (Mo.App. E.D. 1975) (five year statute of limitations ran from the last date for which the employees demanded payment) and Allen v. Allen, 270 S.W.2d 33, 38 (Mo. 1954)("when several payments are made to discharge an obligation …, a separate cause of action accrues when each payment is made, and the statute of limitations as to each cause of action runs from the date of the particular payment…).

Roberts v. Neale, 114 S.W. 1120 (Mo. App. 1909) holds:

> Suppose that these payments were on one transaction and were made so that some of them were older than the period of limitations and other within the period, would not the aggregate constitute a single demand? And as each successive payment was made, would it not be merely enlarging the single demand, until the last one, within the period of limitation, would make the total of a single claim, the subject of a single action? It has been so decided. Kearns v. Heitman, 104 N.C. 332, 10 S.E, 467.

Id. at 1121.

Under the TIF Act, PILOTS and EATS are tantamount to a debt in St. Charles County payable to St. Peters in yearly installments based on the tax increments for that year. Indeed, the amount due in any given year is not known until assessments (PILOTS) and sales tax revenues (EATS) are computed based on annual assessed valuations and sales tax increases or decreases, respectively.

Likewise, under the continuing wrong doctrine, each payment by St. Charles County extended the statute of limitations.

> If, … the wrong may be said to continue from day to day and create fresh injury from day to day, and the wrong is capable of being terminated, a right of action exists for the damages suffered within the statutory period immediately preceding the suit.

Davis v. Laclede Gas Co., 603 S.W.2d 554, 556 (Mo. banc 1980). See also, Kelly v. Cape Girardeau, 89 S.W.2d 41,44 (Mo. 1935), reversed on other grounds by

Chappel v. City of Springfield, 423 S.W.2d 810 (Mo. 1968)("[t]he rule is well settled that the statute of limitations runs against each injury separately and commences to run from the date of the injury. Limitation of Action, § 249 C.J.S. p.883. The injury to St. Charles County was made fresh each and every time St. Peters billed for, and the County made payment of, PILOTS or EATS to the City. With each payment sprang a new wrong and payments made within the five years prior to the date of filing of the original petition are not barred by the statute of limitations.

The fallacy of the trial court's ruling is seen by reversing the position of the parties. If St. Charles County had refused to make any more payments of PILOTS or EATS to St. Peters, St. Peters could not ascertain its total damages resulting from such refusal beyond the amount of the present year's PILOTS and EATS payment that is due. Yet under the trial court's ruling, in that circumstance St. Peters would be required to sue St. Charles County for taxes yet-to-be collected in amounts yet-to-be-determined once the first payment was not made.

Under the settled law of Missouri, each payment by St. Charles County extended the statute of limitations. Estell v. Estate of Iden, 714 S.W.2d 774, 777 (Mo.App. E.D. 1986); Sabine v. Leonard, 322 S.W.2d 831, 837[3] (Mo. banc 1959); American Surety Co. of New York v. Fruin-Bambrick Construction Co., 166 S.W. 333 (Mo. App. 1914); Beeler v. Finnel, 85 Mo. App. 438 (1900); Allen v. Allen, 270 S.W.2d 33, 38 (Mo. 1954); Davis v. Laclede Gas Co., 603 S.W.2d 554, 556 (Mo. banc 1980); Kelly v. Cape Girardeau, 89 S.W.2d 41, 44

(Mo. 1935).

Conclusion

The trial court erred in sustaining St. Peters' Summary Judgment Motion on the grounds that the limitations of § 516.100 barred the Plaintiffs causes of action.

IX. The Trial Court Erred in Ruling that the Doctrines of Laches, Estoppel, and Waiver Bar Plaintiffs' Causes of Action Because:

(A) St. Peters Failed Properly to Plead its Affirmative Defenses in that St. Peters Failed to Plead Facts in Support of the Affirmative Defenses as Required by Rules 55.07, 55.08; and 55.11; and

(B) the Doctrines of Laches, Estoppel and Waiver do not Apply in this Case in that Plaintiffs Timely Filed their Causes of Action and Defendant St. Peters did not Rely on Assurances from St. Charles County in Creating the SPCRA and Defendant St. Peters did not Change its Position in Reliance on St. Charles' Acts.

Standard of Review

Review of an order entering and refusing to enter summary judgment is *de novo*. ITT Commercial Finance Corp v. Mid-America Marine Supply Corp., 854 S.W.2d 871, 876 (Mo. banc 1993).

Argument

(A) St. Peters Failed Properly to Plead its Affirmative Defenses in that St. Peters Failed to Plead Facts in Support of the Affirmative Defenses.

Missouri is a fact pleading state. Affirmative defenses, like all proper pleadings, must aver the factual basis for each defense. "An affirmative defense is asserted by the *pleading of additional facts* not necessary to support a plaintiff's case which serve to avoid the defendants' legal responsibility even though plaintiffs' [sic] allegations are sustained by the evidence." Reinecke v. Kleinheider, 804 S.W.2d 838, 841 (Mo.App.1991). [Emphasis added.]

As ITT Commercial Finance Corp. 854 S.W.2d at 383-84 (Mo. banc 1993) makes clear,

> Rule 55.07 requires that "[a] party shall state in short and plain terms his defenses to each claim." Rule 55.08 requires that "a party shall set forth affirmatively ... matter[s] constituting an avoidance or affirmative defense." Finally, Rule 55.11 requires that "[a]ll averments of claim or defense ... shall be limited as far as practicable to statement of a single set of circumstances." In the context of pleadings, "aver" means "to allege or assert positively." *Blacks Law Dictionary* 136 (6th ed. 1990). Thus, the rules contemplate that the factual basis for defenses be set out in the same manner as is

required for pleading of claims.

This has been the rule in Missouri since 1853. Sybert v. Jones, 19 Mo. 86, 88 (1853). See, also Northrup v. Mississippi Valley Ins. Co., 47 Mo. 435, 443 (1871).

In ITT Commercial Finance Corp. the defendants pleaded:

> 3. For further Answer and by way of affirmative defense, Defendant Evert states that Plaintiff Mercantile is barred from any relief by estoppel, waiver, duress and failure of consideration.

Id. at 383. This Court held:

> Bare legal conclusions, such as those set forth by [the defendant], fail to inform the plaintiff of the facts relied on and, therefore, fail to further the purposes protected by Rule 55.08 …. We hold that [defendant's] affirmative defenses as set out above are insufficient as a matter of law.

Id. at 383 – 84.

Here, for example, St. Peters pleaded:

> G. The claims in all Counts of the Petition are barred by the doctrines of waiver, estoppel and laches in that Plaintiffs have accepted and retained benefits, including but not limited to the receipt and use of revenues under the provisions of the TIF Act and as a result of the TIF Redevelopment challenged in this action.

(LF 49-50). Like the pleadings in ITT Commercial Finance, these pleadings are insufficient as a matter of law.

In order for waiver, estoppel and laches to be properly pleaded, each must set out facts that meet the elements of the defense. For example, to plead estoppel properly, a defendant must plead a voluntary act by the plaintiff upon which the defendant relies to its detriment. "One cannot set up another's act or conduct as the ground of an estoppel unless the one claiming it was actually misled or deceived by such act or conduct…." Missouri Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 811 S.W.2d 28, 34 (Mo. App. 1991); State ex rel. Sprouse v. Carroll County Comm'n, 889 S.W.2d 907, (Mo.App.1994). Further, where estoppel is pleaded against a governmental entity, the pleader must plead affirmative misconduct. Farmers & Laborers Co-Operative Ins. Assn. v. Director of Revenue**,** 742 S.W.2d 141, 143 (Mo. banc 1987). As to estoppel, St. Peters has failed to plead facts sufficient to plead the affirmative defense.

Laches similarly requires that the party asserting laches as an affirmative defense must aver facts showing that the pleader changed its position in reliance on the Plaintiffs' acts or that evidence necessary to defend itself no longer exists because of the passage of time. Metropolitan St. Louis Sewer Dist. v. Zykan, 495 S.W.2d 643 (Mo. 1973); Bickel v. Argyle Inv. Co., 121 S.W.2d 803 (Mo. 1938). St. Peters has failed to plead any such facts.

The trial court erred in considering the affirmative defenses pleaded by St. Peters.

(B) Plaintiffs Claims Are Not Barred By Laches

The trial court held that the equitable doctrine of laches bars the claims asserted by Plaintiffs against St. Peters. Laches is not available as a defense in this case, and even if it were, it would not bar St. Charles County's particular claims.

1. Laches is not available against officers of a Political Subdivision

In Reorg. School Dist. R-I of Crawford County v. Reorg. School Dist. R-III of Washington County, 360 S.W.2d 376, 381, (Mo. banc 1962) a defendant school district asserted laches in an action where the plaintiff school district claimed that the defendant district had been paid taxes that rightfully should have been paid to the plaintiff district. The defendant school district pleaded laches as an affirmative defense. The court rejected the defendant district's laches argument.

> Laches on the part of the government in bringing suit is said not to be a defense in the case of a claim which is founded on sovereign right. It is also observed that the laches of the officers of the government cannot be set up as a defense to a claim which is made by the government.

Id. at 381, *citing* State ex rel. Taylor v. Blair, 210 S.W.2d 1 (Mo. 1948).

At the trial court, defendants stated "[t]here can be no dispute that the County and its County Executive knew about the Plan at the time of the adoption

(or at least at the time of the first EATS increment payment to the City in 1995, Exhibit 5, 1995 Annual Report)." (LF 389). St. Peters' laches defense rests on the knowledge of the County and its Executive – the very thing that Reorg Sch. Dist. and Blair rejected as a basis for laches.

2. **St. Peters failed to meet its burden of proof on laches**

Laches is the neglect for an unreasonable and unexplained length of time under circumstances permitting diligence to do what in law should have been done. Lake Development Ent. v. Kojetinsky, 410 S.W.2d 361, 368 (Mo. App E.D. 1966); The doctrine of laches is not encouraged in equity. Id; Higgins v. McElwee, 680 S.W.2d 335, 341 (Mo. App. 1984). The time after which laches attaches depends on the facts and circumstances of the case. Lake Development, 410 S.W.2d at 368. Mere delay in asserting a right does not of itself constitute laches as the delay must work to the disadvantage and prejudice of the defendant. Id. The burden of proof is on the party asserting the defense. Id.; Metropolitan St. Louis Sewer District v. Zykan, 495 S.W.2d 643 (Mo. 1973).

Importantly, the invocation of laches requires defendants to show that unreasonable delay operates to their prejudice, Lyman v. Walls, 660 S.W.2d 759 (Mo. App. E.D. 1983), and the prejudice is material. Jennings v. Director of Revenue, 9 S.W.3d 699, 700 (Mo. App. 2000).

The type of prejudice which supports laches is generally of two kinds: (1) loss of evidence which would support defendant's position or (2) a change of

position in a way that would not occur but for the delay. Id. In other words, the mere lapse of time is not sufficient to support the defense of laches, Higgins**,** 680 S.W.2d at 341; instead, the delay must have been such as to prevent the court from arriving at the safe conclusion of the truth and thus to make the doing of equity either doubtful or impossible. Bickel v. Argyle Inv. Co., 121 S.W.2d 803 (Mo. 1938). Put another way, the doctrine of laches is purely equitable and cannot be invoked to defeat justice. Laches will be applied only where enforcement of a right asserted would work an injustice. Id; Metropolitan St. Louis Sewer District, 495 S.W.2d 643; Lake Development , 410 S.W.2d at 368; Higgins, 680 S.W.2d at 341.

Defendants failed to produce any facts in their summary judgment papers showing that they are entitled to invoke laches.

First, St. Peters does not claim or show any prejudice because it changed its position in reliance on St. Charles County's failure to bring this action until August, 2000. Second, St. Peters does not claim that there has been a loss of evidence in this case.

The only prejudice St. Peters asserts is the negative impact of having to repay to St. Charles what the City obtained contrary to the law. This is not the type of prejudice a court of equity will consider in reviewing a claim of laches. Higgins, 680 S.W.2d at 341; Lyman**,** 660 S.W.2d 759. If it were, laches would be a defense in nearly any action to recover money damages. Simply put, any delay here has not been significant nor has it had an impact on the ability of the court to

arrive at the safe conclusion of the truth; the filing of this action in August 2000 did not and does not work any inequity doubtful or impossible. Id.

The trial court relied on Dunklin County v. Chouteau, 25 S.W.553 (Mo. 1894) to conclude that the County's claims were barred by laches in this case. There, the county waited 33 years to challenge title to real estate. Those facts are far different than those in this case.

(C) St. Charles County Is Not Barred By Estoppel or Waiver Because It Has Taken No Affirmative Act.

The trial court concluded that Plaintiffs' cause of action is barred by estoppel and waiver. The trial court concluded that because tax revenues have increased in the SPCRA, and because St. Charles has collected these taxes, St. Charles is somehow estopped to challenge Ordinance No. 1961 or claim a refund if the TIF funds were improperly collected.

Estoppel and laches are closely related. Stenger v. Great Southern Sav. and Loan Ass'n, 677 S.W.2d 376, 383 (Mo.App.1984). Equitable estoppel arises from the unfairness of allowing a party to assert known rights belatedly when the other party has, in good faith, relied on actions of the opposing party and become disadvantaged. Estoppel consists of three elements: 1) an admission, statement, or act by the person to be estopped that is inconsistent with the claim that is later asserted and sued upon, 2) an action taken by a second party on the faith of such admission, statement or act, and 3) an injury to the second party which would result if the first party is permitted to contradict or repudiate his admission,

statement or act. Pinnell v. Jacobs**,** 873 S.W.2d 925, 927 (Mo.App.1994).

Estoppel is not a favorite of the law and will not "arise unless justice to the rights of others demands it." Peerless Supply Co. v. Industrial Plumbing & Heating Co., 460 S.W.2d 651, 666 (Mo.1970). The doctrine of equitable estoppel will not be applied lightly. State ex rel. Sprouse v. Carroll County Comm'n, 889 S.W.2d 907, 911 (Mo.App.1994). The burden of proof is upon the party asserting it to establish the essential facts by clear and satisfactory evidence. Lake St. Louis Community Assn. v. Ravenswood Properties, 746 S.W.2d 642, 646, (Mo. App. 1988). The doctrine is restricted in application to those cases in which each and every element clearly appears. Pinnell**,** 873 S.W.2d at 927.

Estoppel rarely applies to the acts of a governmental body. Director of Revenue v. Oliphant, 938 S.W.2d 345, 346 (Mo. App. 1997). In order for governmental conduct to rise to the level of estoppel, the conduct complained of must "amount to affirmative misconduct." Id. at 346, *citing* Farmers & Laborers Co-Operative Ins. Assn. v. Director of Revenue**,** 742 S.W.2d 141, 143 (Mo. banc 1987).

One who voluntarily accepts benefits conferred by a statute or ordinance cannot later complain about its validity in order to avoid its burdens. St. Louis Public Service Co. v. City of St. Louis, 302 S.W.2d 875 (Mo. 1957). St. Charles County did not voluntarily accept increases in sales tax revenue from St. Peters, however; those increases were the property of St. Charles County by operation of law. St. Charles paid invoices submitted by St. Peters under compulsion of law –

that is, payments were made because the TIF Act required St. Charles to make the payments.

Estoppel depends on voluntary action by one party in accepting the benefits conferred under an ordinance or statute. For these reasons a railroad could not refuse to maintain a roadway that was made a part of its franchise agreement. In re Topping Avenue, 187 Mo. 146, 86 S.W. 190 (1905). *See also* State ex rel. Buchanan County v. Imel, 242 Mo. 293, 146 S.W. 783 (1912)(probate judge who accepted office under statute requiring fee payments to the treasury could not question the validity of the statute because of estoppel); State v. Bennett, 315 Mo. 1267, 288 S.W.50 (1926) (Hunter who obtained license and hunted with that license estopped to challenge the constitutionality of the provision that required him to submit to inspection by game warden); DeMay v. Liberty Foundry Co., 327 Mo. 495, 37 S.W.2d 640 (1931)(employee who accepted benefits under Workers Compensation precluded from claiming Act unconstitutional).

In each of those cases, a voluntary act by the plaintiff worked an estoppel because the law does not permit a party to accept the benefit of a statute without shouldering its burden. Here St. Charles County never took an affirmative act to accept benefits under the Redevelopment Plan. It was collecting taxes in that area before the adoption of the Redevelopment Plan, and continues to collect them today. It does so under authority of law, not under a voluntary acceptance of benefits offered that could have been refused. Because St. Charles never took an affirmative act to bring itself within the ordinance of its subordinate township, it

cannot be said to have affirmatively waived its right to challenge the validity of the statute or to obtain repayment of TIF revenues collected illegally under the illegal ordinance.

Because the City of St. Peters has not pleaded or shown a voluntary act or admission, and because the elements of estoppel must be proved strictly by clear and satisfactory evidence, St. Peters' claim of estoppel fails. Sprouse, 889 S.W.2d at 911; Lake St. Louis Community Assn, 746 S.W.2d at 646.

1. No Evidence of Reliance or Injury

Before the trial court, St. Peters never mentioned the elements of estoppel and never set out facts showing how the City relied upon any actions of the County. In fact, the City took steps to take advantage of the tax well before it billed the County for PILOTS and EATS. Other than claiming that refunding the unlawfully-retained tax monies would be a financial burden, the City has not shown any injury flowing from the acts upon which it premises estoppel.

"One cannot set up another's act or conduct as the ground of an estoppel unless the one claiming it was actually misled or deceived by such act or conduct…." Missouri Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 811 S.W.2d 28, 34 (Mo. App. 1991); State ex rel. Sprouse v. Carroll County Comm'n, 889 S.W.2d 907, (Mo.App.1994).

Having failed to show all the elements of equitable estoppel, the City's defense of estoppel fails. Sprouse, 889 S.W.2d at 911; Lake St. Louis Community Assn, 746 S.W.2d at 646.

2. No Evidence of Governmental Misconduct.

In order for St. Charles County's conduct to be asserted as the basis for estoppel in this context, the voluntary act of St. Charles must amount to affirmative misconduct. Director of Revenue v. Oliphant, 938 S.W.2d 345, 346 (Mo. App. 1997). Defendants have not so pleaded, nor have they so established. Having failed to show all the elements of equitable estoppel, the City's motion for summary judgment should be overruled. Sprouse, 889 S.W.2d at 911; Lake St. Louis Community Assn, 746 S.W.2d at 646.

The trial court failed to provide any analysis supporting a waiver.

Conclusion

The trial court's order concluding that the Plaintiffs' causes of action are barred by laches, estoppel, and waiver are clearly wrong and must be reversed.

CONCLUSION

For the reasons expressed, the trial court erred in sustaining Defendant's Motions for Summary Judgment and in Failing to Sustain Plaintiffs' Motion for Summary Judgment. Respectfully, this Court should enter its mandate reversing the trial court and entering the order the trial court should have issued sustaining Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Rule 84.06(b) in that it contains 27,619 words. Disks were prepared using Norton Anti-Virus and were scanned and certified as virus free.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was sent via United States Mail, first-class postage prepaid on this 15th day of November, 2004, to:

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